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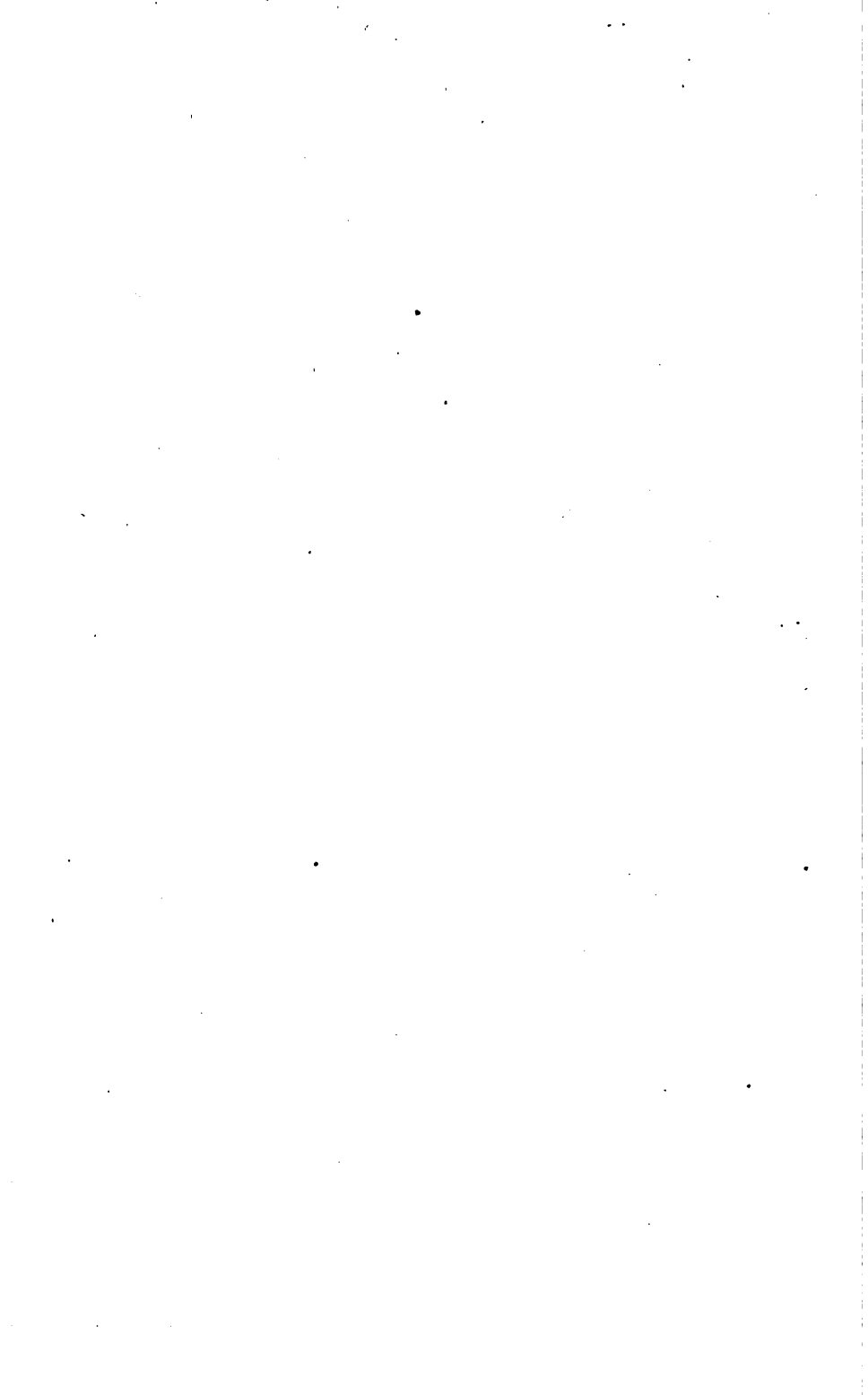
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Spanish paper
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THE
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THE
LAW MAGAZINE;
OR,
QUARTERLY REVIEW OF JURISPRUDENCE.

No. CVIII.

ART. I.—POINTS IN THE HISTORY OF OUR LAW
MERCHANT.

HAVING made arrangements for the appearance in this Magazine of a series of papers bearing upon such topics connected with mercantile law as may from time to time, whether by reason of their intrinsic importance or of projected legislation touching them, demand attention, we here purpose, by way of introduction, to offer some remarks, desultory perchance, yet individually much considered, relative to certain points and epochs in the history of our Law Merchant. The inquiry, of which some sketch or outline merely is on this occasion attempted, would, as we conceive, if fully carried out, possess great and indubitable interest—an interest increased by this circumstance, that the subject adverted to, although voluminously treated by various well-known statistical writers, has never yet been regarded from a strictly legal point of view, or thoroughly investigated by a legal mind. Possibly the hints thrown out in the ensuing pages, and the remarks, somewhat loosely strung together, there appearing, may hereafter, by some abler hand, be amplified and methodized, with a view to supplying a deficiency in legal literature much to be deplored.

To any one who shall be minded to apply himself to this task,

we would earnestly commend for consideration the general tenour and spirit of the following remarks, made by Mr. Reeves in the introduction to his accurate, though rather dry and uninviting, "History of the English Law." He observes, that in order to have a right conception of our old jurisprudence, it is necessary that the inquirer should forget for a while every alteration which may have been since made—should enter upon his investigations with a mind wholly unprejudiced, and should explore the old with the same attention which is bestowed upon the modern system of law. "The law of the time," he adds, "would then be learned in the language of the time, untinctured with new opinions; and when that was clearly understood, the alterations made therein, in subsequent periods, might be deduced and exhibited to the mind of a modern jurist in the true colours in which they appeared to persons who lived in those respective periods." If, then, "our statutes and the interpretation of them, with the variations that have happened in the maxims, rules, and doctrines of the law, were presented to the reader in the order in which they successively originated, such a history, from the beginning of our earliest memorials down to the present time, would not only convey a just and complete account of our whole law as it stands at this day, but place many parts of it in a new and more advantageous light than could be derived from any institutional system, in proportion as an arrangement conformable with the nature of the subject surpasses one that is merely artificial." The view thus expressed by Mr. Reeves seems to us to be correct, and might advantageously be followed out by any future historian of that particular branch of law wherewith alone in this article we are concerned.

The *Lex Mercatoria* has been described as "a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith" (per Buller, J., *Master v. Miller*, 4 T. R. 320). It includes *all laws written, customary or traditionary, which are designed to regulate, or which have reference to, mercantile property or persons*. True it is, that the term *Lex Mercatoria* is often used as comprising merely those *customs* recognised and sanctioned amongst

merchants which have become incorporated with our Common Law, and during centuries have constituted part and parcel of the *lex terre* here prevalent; but such a definition is obviously too limited, and is ill suited for one who would apply himself to an examination, however cursory, of the origin and progress of our mercantile institutions.

Adopting the wider view above suggested, we may affirm that the component elements of our Law Merchant are—1st, Express enactments; 2ndly, Mercantile usages or customs; 3rdly, The abstract principles of our unwritten law—evidenced either by reported cases or by text-writers of repute, so far as those principles are applicable to mercantile transactions.

Mercantile Customs would seem to be properly divisible into three classes: 1st, Customs alluded to by Blackstone (1 Com. 273), as those “which all nations agree in and take notice of.” 2ndly. Customs prevailing throughout the length and breadth of this country, which are in general judicially noticed here without proof,—at all events when they have been once established and shown to exist: for instance, “by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties” (per Eyre, C. J., *Master v. Miller*, 2 H. Bla. 140).

To customs of this latter kind, Lord Campbell also evidently alludes in *Brandao v. Barnett* (12 Cla. & F. 787), where he says that the general lien of bankers is part of the Law Merchant, and is to be judicially noticed like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the Law Merchant, which Courts of justice are bound to know and recognise. Such, remarks the Lord Chief Justice, has been the invariable understanding and practice in Westminster Hall for a great many years: there is no decision or dictum to the contrary; and justice could not be administered, if evidence were to be given *toties quoties* to support such usages—an issue being joined upon them in each particular case.

To the third class of customs above mentioned may be referred

such as are purely local, and which must, when relied upon, be proved.¹ Customs of this kind, or rather local usages of trade, are very frequently relied upon in courts of law, in order to explain ambiguous instruments, or to add to the contracts of parties terms not inconsistent with them.

Bearing in mind, then, that customs are distinguishable into the three classes just specified, we would repeat that mercantile law, in fact, depends, 1st, upon specific statutes; 2ndly, upon the customary or unwritten law, so far as that may be applicable to mercantile transactions; 3rdly, upon customs or usages prevalent amongst merchants.

Such being the component elements of our Law Merchant, we would next remark that its history may properly be treated as divisible into three several portions,—the first of these periods commencing with the Norman Conquest, and extending down to the time of Sir E. Coke, who became Chief Justice of the Common Pleas on the 30th of June, A.D. 1606, and presided in the Queen's Bench from 1613—1616; the second of the three periods above referred to extending from the last-mentioned epoch down to the appointment of Lord Mansfield, in the year 1756; and the third reaching down to the present time, from the date last mentioned. During the first of these periods we shall find commerce slowly, and with difficulty, struggling into some sort of recognition and importance. During the second we shall find considerable efforts and some substantial progress made in fixing the laws designed to regulate it. During the third period we shall find our *Lex Mercatoria* erected gradually on a firm, enduring, and comprehensive basis: this great result having been effected mainly by the efforts of our judges, in discussing and ascertaining the principles of commercial law, and the rules which ought to govern it; partly also by the assiduity of our legislature in the framing of remedial measures where those rules and principles were proved to be inadequate or inapplicable.

On inquiring as to the origin of our mercantile law, we must

¹ As instances of customs falling within the class here adverted to, see *Pollock v. Stables*, 12 Q. B. 765; *Sutton v. Tatham*, 10 Ad. & E. 270; *Dails v. Lloyd*, 12 Q. B. 531.

be prepared to find that whilst the feudal system retained its vigour—whilst military prowess and physical force were most esteemed—whilst land with its peculiar rights and burthens was thought the most valuable possession—whilst the power of the Crown was exerted to check alienation and the transfer of property, which is the life and soul of trade (per Eyre, C. J., 4 T. R. 820), and generally to discourage the arts of peace—in such times, we must be prepared to find but few evidences of anything worthy the name of mercantile law prevailing here. To Richard I., indeed, as some learned writers have contended—but at all events to at least as early an epoch in our history—we are indebted for the Laws of Oleron, a body of maritime law which, by reason of the wisdom with which it was framed, obtained general reception amongst the nations of Western Europe, and has even been admitted as an authority on admiralty questions in some of the States of North America. (8 Kent. Com. 7th ed. 11—12; 1 Duer, Mar. Ins. Introd. 88; 1 Bla. Com. 419.) It is, however, in Magna Charta, as ratified by Henry III., that we first meet with positive *enactments* of importance, having direct reference to the Law Merchant, and evidently designed to benefit and encourage trade.¹

The 25th chapter of this Act aims at regulating to some extent the sale of the necessaries of life, by requiring that “one measure of wine shall be used throughout the realm, and one measure of ale, and one measure of corn;” whilst chapter 30 enacts, that foreign merchants shall have safe and sure conduct to come into, tarry in, and depart out of England, in order to buy and to sell without being subjected to any manner of [evil] tolls, save *per antiquas et rectas consuetudines* (see 6 Co. Rep. 239); i. e., according to the established dues and customs imposed by authority of Parliament. (2 Inst. 58; 1 Bla. Com. 314—315.)

Such was the wise and liberal policy of our Great Statute for the protection of foreign traders—a policy which was still further carried out in the ensuing reign by the statute of Acton Burnel (11 Edw. 1, c. 1), which was passed in order to facilitate the recovery of their debts by merchants; and recites that the

¹ See Reeves's Hist. of Eng. Law, i. 234.

absence of any "speedy law" to compel such payment, had deterred many merchants from coming "into this realm with their merchandizes, to the damage as well of the merchants as of the whole realm."

Under the Act last referred to, any merchant who wished to secure payment of a debt due to him could cause his debtor to enter into a certain kind of recognisance called a Statute Merchant, upon which execution against the goods or person of the debtor might, on default made in payment of the debt, be at once issued; and "if the creditor be a merchant stranger, he shall remain at the costs of the debtor for so long time as he tarryeth" about his suit, and until the goods and chattels of his debtor be sold and delivered to him. We may add, that the facilities afforded to a creditor by this statute were much extended by the 13 Edw. 1, stat. 8, c. 1, which compelled a debtor who could not otherwise satisfy the claims upon him, to sell his land, or enabled the merchant creditor to seize and hold it until the debt secured by the Statute Merchant had been satisfied.¹

With a view to the further encouragement of foreign trade, another statute, of some interest in a historical point of view, was passed in the reign of Edward III.² It was then thought advisable to prohibit the export of certain kinds of merchandise by home traders, and thus to attract foreigners to these shores for the purposes of traffic. Certain towns were accordingly constituted markets or staples for the purchase and sale of the commodities in question, under special rules and conditions which there had force—"the staple being intended in its very institution for the resort of foreign merchants, and it being thought wise and expedient that some mode of administering justice between parties should be devised, which would be more consonant with the ideas of foreigners, and more adapted to the nature of mercantile transactions for ease and despatch than the common process of the law."³ It may be proper to add, that this statute, though originally confined in its operation to persons dealing in certain places only, was by a subsequent

¹ 2 Reeves, Hist. E. L. 160.

² 27 Edw. 3, st. 2.

³ 2 Reeves, Hist. E. L. 303, 304.

Act (23 Hen. 8, c. 6) extended to all persons who chose to avail themselves of its provisions. The learned reader will remember that Sir E. Coke, in his 4th Inst. ch. 46, treats of the Court of the Mayor of the Staple at Westminster, which, he says, is guided by the Law Merchant, which is the Law of the Staple; and further, that Blackstone, in the second volume of his Commentaries, pp. 160—161, enters at some length into an inquiry as to the nature of estates held by Statute Staple and Statute Merchant.

The Statute Merchant and Statute Staple were indeed, as appears from Blackstone, at one time common assurances here, and their tendency obviously was to facilitate the alienation of real property, restrictions upon which had been imposed by Magna Charta, chap. 32, which forbade the alienation of land, unless where the residue remaining to the tenant was sufficient to enable him to perform his feudal services to his lord (Sulliv. Lects. 149, see also 2 Reeves, Hist. Eng. L. 232), and also by the statute of Quia Emptores, forbidding subinfeudation, which has truly been described as "the first step towards voluntary alienation." Upon this point Dr. Sullivan tells us in his 15th lecture (pp. 144—146) that one great and striking difference between allodial and feudal lands consisted in this, that the former entered into commerce; they were saleable or otherwise alienable at the will of the possessor, either by act executed and taking effect in his lifetime, or by will to take effect after his death. Feudal estates, however, were not liable to the debts contracted by the feudatory; for if the creditor might have sold them for debt, a wide door for alienation had been opened by means of fictitious debts contracted by collusion between the creditor and vassal. "But," continues the writer above named, "as times grew more settled, and the strictness of the military system abated—as commerce increased, and with it luxury, the propensity to alienation grew up, and became at length so strong in every country as to be irresistible. And it is a speculation not only curious, but very useful for the students of our law, to observe and remark its progress in England: *the first step towards voluntary alienations arose from the practice of subinfeoffing.*"

Passing over, in the rapid view which we are now taking of the history of our Mercantile Law, any detailed reference to the statutes of Labourers, passed in the reigns of Edward III. and Elizabeth, of the earlier whereof the scope and operation were minutely considered by the Court of Queen's Bench in the well-known case of *Lumley v. Gye* (2 E. & B. 216), it will not be irrelevant to notice that during the reigns of Henry VI. and Edward IV., as well observed by Mr. Reeves,¹ personal property was gradually attracting to itself consideration, and, owing to the increase of trade and manufactures, was becoming more and more a subject of discussion in our courts, so that lawyers were compelled to bestow upon it some share of that attention which seems before to have been wholly engrossed by the learning of real property. Thus, in the Year-books of the date just mentioned, we find questions agitated as to the rights of ownership in animals and goods—the effect of a sale in market overt, and the applicability of the maxim *caveat emptor*—the necessity (so well established at this day) of a *consideration* to support a contract, and the liability of the principal for the act of his agent. Hence we may clearly infer that the elementary principles, at all events, on which the Law of Contracts and the Law Merchant alike depend, were, in the latter half of the 15th century, beginning to receive that attention which is so justly due to them.

In reference to this part of our subject, it is remarked by a learned writer,² who discusses legal history and legal principles with a force and elegance of diction which no other professional author of the present day has ventured to attempt, that our—

“Mercantile law is deducible in great part from the imperial code of Rome, and the different maritime codes of ancient Europe. It is chiefly conversant with personal property, the laws regulating which are to be looked for in that of Rome. Our ancient jurists, devoted almost entirely to the explanation of the feudal system, and its consequences to the tenure of real property, rarely discuss the nature of personal property, which, as we have seen, was regarded as an inferior and altogether inconsiderable species of possession; but

¹ Hist. E. L. iii. 369.

² See Mr. Warren's recently-published epitome of Blackstone's Commentaries (p. 496), a work which contains much original and valuable matter, and, being written in a high and praiseworthy spirit, is specially recommended for perusal to students of the law.

whenever they do so, they adopt, and almost *verbatim*, the doctrines and language of the civilians: and the more readily, as they find that already done by the ecclesiastical authorities, in administering such property after the death of its owner. Thus the imperial law, so fiercely repelled from any interference with the landed interest, was adopted as the governing principle of a description of property destined ultimately to compete, at least in importance, with that landed interest."

To another important doctrine of the Law Merchant, referable to the epoch now under notice, we would here also specifically advert; it is shortly expressed by the maxim, *Jus accrescendi inter mercatores pro beneficio commercii locum non habet*. One peculiar and distinctive feature of a joint tenancy in land, as Littleton informs us in his 280th section, was this: That the surviving tenant took the entire estate in it to himself. Nor was it only among joint tenants of estates of freehold that the right of survivorship prevailed; the same rule applied as between those who were jointly possessed of a chattel, whether real or personal, as of a lease for years, or of a horse,¹ or even of a debt; so that if a bond or other obligation were made to several, the survivor amongst these joint obligees would be entitled to the entire debt. The very recent case of *Crossfield v. Such* (8 Exch. 825) shows, moreover, that where stock is purchased in the joint names of two persons, the survivor of those two is, *at law*, absolutely entitled to the fund.

The rule just stated, however, as Lord Coke tells us (1 Inst. 182 a), did not extend to *merchants*, an exception being made in their favour "for the advancement and continuance of commerce and trade." And the late decision of the Court of Exchequer, in *Buckley v. Barber* (6 Exch. 164), shows us that the exception in question applies also to manufacturers; for the term "merchant" was at a very early period liberally construed, and the principle on which the exception is founded, viz. the encouragement of trade, holds equally with reference to manufacturers in partnership, and to every description of trade.

At a somewhat later date than that just adverted to, but during the period now under review, our attention is attracted by the first Statute of Bankrupts (34 & 35 Hen. 8, c. 4), an

¹ Litt. s. 281.

² Id. s. 282.

Act which applied, however, not merely to traders, but to all who "craftily obtained possession of other men's goods, and then suddenly fled to parts unknown, or kept house." It is observable that the provisions of this Act are in their character highly penal, the bankrupt being viewed as a criminal, whose delinquency could only be expiated by payment of the uttermost farthing: so that after he had, by operation of the statute law, been stripped of all his property, he was still to remain liable in respect of unsatisfied demands.¹ We may remember that this statute of Henry VIII. was almost wholly superseded by the 13 Eliz. c. 7, which latter enactment remained unrepealed until the reign of George IV., and may be considered as the origin of our existing system of Bankrupt Laws, "the leading object of which is to prevent persons from consuming the substance which they have craftily acquired by credit of other men, and to secure an equal or rateable distribution of the bankrupt's property amongst his creditors, without, however, pressing with any undue harshness upon the unfortunate trader."²

The policy which has influenced modern legislation in regard to bankrupts and insolvents has, indeed, according to our deliberately-formed opinion, erred grievously by inclining to undue leniency. It is a common saying, which has something more than a colour of truth to recommend it, that the trader who has failed for half a million (if not as in some recent and lamentable instances shown to have been guilty of gross negligence and dishonesty) is halfway on the road to fortune. At all events, we may in solemn soberness affirm that liabilities of vast amount incurred by over-trading, by wild speculation, or by reckless extravagance, are continually "wiped off" at the cost of some trifling personal inconvenience, or, perchance, of imprisonment for some short term; such punishment being wholly incommensurate with the degree of *moral* culpability which attaches to the individual whose conduct is submitted to investigation, or with the amount of ruin and misery which he has spread around him.

As closely allied to the subject just touched upon, we may

¹ See Reeves's Hist. E. L. iv. 254, 255.

² See the Case of Bankrupts, 2 Rep. 24 b, and notes thereto.

observe, that the statutes against fraudulent gifts or conveyances (13 Eliz. c. 5; and 27 Eliz. c. 4¹), upon which Twyne's case (3 Rep. 80) was decided, are referable to the first of the three epochs in mercantile history specified at p. 4. That case has indeed a direct bearing upon the Law Merchant, inasmuch as the question there agitated was, whether a general deed of gift, made by a defendant *pendente lite*, could be upheld against the execution creditor. In his report of this case, Lord Coke takes occasion to lay down several wholesome maxims which traders would do well (irrespective of our existing bankrupt law) to keep in mind: thus, he says that when any gift of chattels is made, even though in satisfaction of a debt due by one who is indebted to others also, 1st. It should be made in public, and not in private, for *secrecy is a mark of fraud*; 2nd. The chattels should be appraised, and their value appropriated specifically *pro tanto* to the particular debt; 3rd. Immediately after the gift, *possession* should be taken by the donee; "for continuance of the possession in the donor is the sign of trust," and "a trust is the cover of fraud."

Again, the first Act of Parliament which makes mention of insurance in this country, was passed in the 43rd year of Queen Elizabeth (c. 12), and is intituled "An Act concerning Matters of Assurances used among Merchants." The object of this Act was to create a special tribunal for the determination of cases connected with maritime insurance, or, more properly, to confirm and extend the authority of one which the merchants of London had previously established for the purpose just named. It must not, however, be supposed that maritime insurance had its origin in the provisions of this statute, or that it was then of recent introduction, and on that account requiring to be regulated by Parliament; on the contrary, not only do the provisions of this Act recognise the practice of insurance as already established here, but its preamble recites that it had been "time out of mind an usage amongst merchants both of this realm and of foreign nations,"—expressions which are quite consistent with the tradition (accepted by the best writers

¹ See as to above statutes, Lord Mansfield's Decisions, ii. 112 *et seq.*

as correct) which ascribes the introduction of maritime insurance to the Lombards, who settled in London in the 13th century, and for a long time conducted almost exclusively the foreign trade of this country. The influence, indeed, of the Italians, it has been remarked, over the commerce and commercial regulations of our ancestors is well known, and is attested, even at this day, by the reference in sea policies to the street which was distinguished by the name and residence of their countrymen.¹

That particular epoch which is marked by the Commentaries of Sir E. Coke and the Treatises of Lord Bacon, must, of course, ever be regarded as remarkable in the history of Law *generally*, and to some extent, as we have shown, of the Law Merchant in *particular*. Confining our attention strictly, however, to the latter branch of law, must be mentioned, as referable to this period, the Statute of Limitations, 21 Jac. 1, c. 16, the 3rd section of which, it may be remembered, specially exempts from its operation "such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants." The Act alluded to, which was passed, as stated in its preamble, "for quieting of men's estates and avoiding of suits," has obviously a most important practical bearing and operation in reference to the Law Merchant. About this period we also find a noticeable decision in the Case of Monopolies (11 Rep. 84 *b*, cited 8 Rep. 125 *a*), which was an action brought for the invasion of the exclusive privilege of making and of importing into the realm playing-cards, granted to the plaintiff by letters patent of Queen Elizabeth; the main question raised on the argument being, whether such an exclusive grant and privilege were good or not. It was held, however, to be wholly void at common law, and, as Lord Coke says, "*odious*," for this reason, that "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees," and to restrain trade and traffic, which is "the life of every commonwealth." (8 Rep. 125, *a*.) The above-mentioned case was decided towards the close of the reign of Queen Eliza-

¹ Duer. Mar. Insur. Introd. 33.

beth; and in the 21 Jac. 1 was passed (c. 3) the Act concerning monopolies, by which, as remarked by a learned writer,¹ they were publicly declared to be illegal, and the law of patents was placed substantially upon its present footing.

As forming a portion of that second epoch, of which we are now speaking, the reign of Charles II. is specially remarkable, not only because it produced the Statute of Frauds (29 Car. 2, c. 3), and the Act abolishing military or feudal tenures (12 Car. 2, c. 24), which is of some considerable importance even in regard to the Law Merchant, but because in it flourished Sir M. Hale, who, first as Chief Baron of the Exchequer, and afterwards as Lord Chief Justice of the Queen's Bench, so essentially contributed to raise the reputation of our courts of law. This upright magistrate and distinguished criminal lawyer does not appear, however, to have aided very perceptibly in the development or consolidation of our Law Merchant; and for this we must rather look to Lord Holt's judicial efforts at a somewhat later period; for *he* undoubtedly laid no inconsiderable portion of the basis of that continually increasing structure—the *Lex Mercatoria*—which now forms so very prominent a compartment of our entire legal edifice. With this great judge, it is said that the present law with regard to bills of lading, or, at all events, the recognition of their transferable qualities, first originated (*Evans v. Marlett*, 1 Lord Raym. 271); and certain it is, that by his celebrated judgment in *Coggs v. Bernard* (Lord Raym. 909), the entire law of bailments, which had previously been ill understood in this country, was, by reference to the doctrines of the Roman law, placed upon a satisfactory foundation, which has never since been visibly agitated or disturbed.

Candour, however, compels us to remind the reader, that Lord Holt resolutely set his face against one useful innovation, necessitated by advancing commerce—we mean the placing of promissory notes on the same footing as bills of exchange, and the permitting by our courts of like remedies upon them. Thus, in *Clerke v. Martin* (Lord Raym. 757), which was an action by payee against maker of a promissory note, we find this eminent

¹ See Smith's Comp. M. L. Introd.

lawyer sturdily declaring that the maintaining of an action upon such an instrument "amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness;" and similarly in *Buller v. Cripps* (6 Mod. 29), which was an action by indorsee against maker of a note, Lord Holt delivered himself to this effect: that "the notes in question are only an invention of the goldsmiths in Lombard Street, who had a mind to make a law to bind all those that did deal with them," &c. But although in thus opposing, "*totis viribus*" (to use the reporter's words), the introduction amongst our trading community of an instrument so useful as the promissory note, Lord Holt seems to have acted in accordance with a policy short-sighted and illiberal, we must bear in mind that opinions conflict in regard to the abstract question of law, whether or not the view which he took of the quality and nature of the promissory note was correct or not; and although the *better* opinion seems to be that it was not so, and that the preamble of the statute of Anne (3 & 4 Anne, c. 9) which declares the existing law as in accordance therewith, is by no means to be deemed conclusive upon the point before us, we may yet reasonably give to Lord Holt the benefit of the doubt which has been thus suggested, and hold him exonerated from all blame in enunciating the law as he found it (though, it must be confessed, with rather unseemly warmth), in reference to that class of mercantile paper of which we have latterly been speaking.

Let us now hasten on to a brief notice of the third and last of those periods which we formerly indicated as marked out in the history of our *Lex Mercatoria* by distinguishable boundaries, that, viz., which commences with the accession of Lord Mansfield to the Court of Queen's Bench. The nature of the change which he effected in the conduct and determination of mercantile cases in our courts of law, has been concisely explained by Mr. Justice Buller, who having long sat as his colleague on the bench, and in virtue also of his own eminent judicial

abilities, is peculiarly well entitled to be heard upon such a subject. In *Lickbarrow v. Mason* (2 T. R. 73), this learned judge observes, that before Lord Mansfield's accession to the bench, the practice was for all the evidence in mercantile cases to be thrown together, and left generally to the jury; so that the decision of a mercantile question then produced no established principle. "From that time," continues Mr. Justice Buller, "we all know the great study has been to find *some certain general principles* which shall be known to all mankind, not only to rule the particular case which may be under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration of the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject [the operation of a bill of lading in transferring the property in goods] which has been decided by Lord Mansfield, who may be truly said to have been the *founder* of the commercial law of this country."

Sir W. D. Evans also observes,¹ with reference to Lord Mansfield, that "possessing a mind in which the most exalted talents were improved by the most extensive cultivation, he regarded jurisprudence as a rational science, founded upon the universal principles of moral rectitude modified by habit and authority, and was anxious to exert those talents in tracing every question of private right or public justice to its proper source; in marking the extent and limits of positive authority; in extracting from a series of particular decisions those common principles which might afterwards be easily resorted to and distinctly applied; and in detecting the fallacy of arguments deduced from the literal interpretation of incidental expressions, or from an affinity of circumstances unsupported by a true analogy of character. It was his endeavour to render the tribunal where he presided not only the instrument of immediate justice, but an instructive seminary to such as were engaged in professional studies; and his distinct and accurate investigations have contri-

¹ See the Introduction to his Collection of Lord Mansfield's Decisions.

buted not less than the excellent Commentaries of Sir W. Blackstone to display the title of the English law to the rank of a connected and elegant science."

We have been tempted to extract verbatim the above passage, because it seems to us to indicate with much precision the true grounds on which Lord Mansfield, when viewed in his judicial character, may command respect and admiration, and because its perusal may operate to remind some who would deny to law the designation of a science, that experienced and thoughtful writers have long since accorded to it that title.

To a like effect, with Mr. Justice Buller and Sir W. Evans, Lord Campbell, in his *Lives of the Chief Justices* (vol. ii. pp. 402—408), speaking of the reign of George II., says that, although England had then become the greatest manufacturing and commercial country in the world, yet her Jurisprudence had by no means been expanded and developed in a corresponding degree; so that when questions arose respecting the buying and selling of goods, the affreightment of ships, marine insurance, or respecting bills of exchange and promissory notes, "no one knew how they were to be determined. Mercantile questions," he adds, "were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves, or, if brought into a court of law, they were determined by the jury according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes." Such having been the state of things prior to the accession of Lord Mansfield, that great judge assumed to himself the task of reducing and methodizing into a system the rules applicable to mercantile cases, and this he did partly by reference to the civil law, but still more by the force and vigour of his own intellect and out of the resources of his own mind. As evidencing this in regard to the law of marine insurance, his judgment in *Carter v. Boehm* (1 W. Bla. 591, S. C. 3 Bur. 1905) may be cited, where the question was as to the effect of a concealment of facts from the underwriter at the time of effecting an insurance on a ship, and where the principles which might guide to a decision were laid down by Lord

Mansfield in a series of propositions which have since been uniformly recognised as sound.

As showing how unsettled the law respecting bills of exchange *must have been* before the time now spoken of, it will be quite sufficient to refer to *Heylyn v. Adamson* (2 Burr. 669), where Lord Mansfield had to decide that in an action on a bill by indorsee against acceptor, a demand on the drawer of the bill is unnecessary, and where the nature of the instrument in question is by that great judge lucidly explained. In *Tindal v. Brown* (1 T. R. 167) also, and *Miller v. Race* (1 Burr. 452), important judgments were delivered by him in reference respectively to the question, what is reasonable notice of dishonour? what are the rights of parties interested where a bank-note, which has been stolen, passes fairly and *bond fide* into the hands of a third person?

Again, in *Luke v. Lyde* (2 Burr. 882), Lord Mansfield decided this important point, that in case of the loss of a ship at sea, freight will be payable only *pro rata*, in proportion to the amount of goods saved, and to the length of voyage which may have been accomplished. The case, moreover, of *Abernethy v. Landale* (Doug. 539) possesses some peculiar interest at the present time: there the plaintiff, a sailor, had engaged himself on board a vessel having a letter of marque, on these terms—that he was to share in the prize-money, and also to receive monthly wages, payable in certain proportions at the different ports of delivery. The vessel on board of which the plaintiff had thus engaged took a prize, but was herself captured before arriving at the first port of delivery; and the question was, whether the plaintiff, who was taken prisoner by the enemy, could legally claim wages until his final return to his country. Lord Mansfield briefly disposed of this question by observing, that, as a sailor on board a ship on a trading voyage, the plaintiff was entitled to nothing, for *freight is the mother of wages, and the safety of the ship the mother of freight*. All claim to wages on account of the trading voyage being thus annihilated, he proceeded to remark, “that in her character of privateer. the crew of the captured vessel were entitled to no wages, for they

all ran equal risks and took their chance of sharing in prize-money."

Again, the accuracy of Lord Mansfield's appreciation of the principles on which depends the law of Principal and Agent, may be illustrated by reference to the case of *Macbeath v. Haldimand* (1 T. R. 172), which is still regarded as a leading authority to show that one who contracts on behalf of Government, will not in general by so doing incur personal liability; a subject claiming our attention in time of war, when governors of distant colonies and commanding officers serving abroad are often obliged to enter into contracts on their own responsibility, and without consulting the Government whose credit they profess to pledge.

Lastly, in *Holman v. Johnson* (Cowp. 341), a question of no little importance arose, before the eminent person whose judicial qualifications we are now discussing, with regard to the contract of sale, viz., whether in an action for the price of goods sold at Dunkirk for the purpose of being smuggled into this country, it was any defence that the plaintiff knew the intention of the purchaser—the goods having been sold in the ordinary course of trade, and the plaintiff having had no concern in the *act* of smuggling. Lord Mansfield's judgment in this case presents in most appropriate and forcible terms the principles of law applicable to illegal contracts, and connected with the doctrine of international comity; and he arrives at the conclusion that the contract in question, however suspicious it might at first sight appear to be, was in truth binding as between the parties to it, and unimpeachable in our courts.

Now, in each of the foregoing cases, with reference to some important and distinct head of Mercantile Law, Lord Mansfield succeeded in tracing out and expounding true and fundamental principles; and yet the adducing of a few such isolated cases, though it may suffice to justify the eulogium of Mr. J. Buller, or that of Sir W. Evans, already cited, must fail in giving a conception of the full amount of benefit conferred on law *as a science*, and on Mercantile Law especially, by the distinguished judge of whom we have latterly been speaking. In the collection already cited of the decisions of Lord Mansfield, classified

under appropriate heads, additional proofs may readily be met with, of what we have been attempting to establish. Under the titles "Contracts," "Corporations," "Insurance," "Bills and Notes" in particular, will be found much matter confirmatory of what has here been said.

From the period of Lord Mansfield's retirement to the present day, it would not be at all necessary for us, even did space allow, to enter into a minute consideration of the progress of our Law Merchant; its principles having during that time been well understood, and on the whole administered with singular uniformity by Courts of Justice; whilst our Legislature has applied itself with such remarkable activity to devising laws for the regulation of commercial property and persons, that an enumeration merely of statutes passed during the last half-century bearing strictly upon the Law Merchant, would be curious by reason of its length, if not very interesting or useful.

An outline of the scope of our *Lex Mercatoria*, as actually operative at this day, remarks Mr. Warren, at page 498 of the very interesting and eloquently-written volume to which we have already directed attention, cannot be better afforded than by the fourfold distribution of the subject adopted by the late Mr. Smith, in his well-known Compendium, *i.e.* into—

"Mercantile persons; Mercantile property; Mercantile contracts: Mercantile remedies. Mercantile *persons*," further observes Mr. Warren, "involve the description of those by whose intervention trade is carried on, *i.e.* sole traders, partners, joint-stock companies, corporations, principals and agents. Mercantile *property* consists of shipping, good-will, negotiable instruments, together with the incidents peculiar to such property: *i.e.* being transferable by, and subject to, the operation of the bankrupt laws: that the right of survivorship (*jus accrescendi*) to real or personal property does not exist among trading partners for the encouragement of commerce: that goods delivered to a trader, to be carried, wrought, or managed in the way of his trade, and trade fixtures, are for the time privileged from distress. Mercantile *contracts* are, bills of exchange and promissory notes, contracts with carriers, contracts of affreightment, maritime, life, and fire insurance, bottomry and respondentia, hiring and service; contracts with seamen, contracts of apprenticeship, sales, debts. Mercantile *remedies* consist of stoppage in *transitu*, lien, bankruptcy.—A faint idea may be gained from this enumeration of the extent, difficulty, and importance of this vast head of English law: concerning which the student may observe, generally, that that

difficulty consists not so much in the subtlety or complexity of the rules regulating it, as in the application of them to endlessly varying combinations of circumstances. Those rules are acted on daily and hourly in the course of business by those unconscious of the deep reasons on which they rest; but whose pecuniary interests, as involved in the justice and equity of such rules, would prompt them to have any one overturned, were it not demonstrably of that character."

Such and thus complicated being the subjects which our Law Merchant applies itself to regulate, we shall hold ourselves excused in declining to enter upon a discussion of them on this occasion—the difficulty to be encountered by one who engages so to do, and the weight of the burden cast upon him, being most materially increased by the ceaseless activity of the Legislature whilst endeavouring, not always successfully, to keep pace with the fair requirements of commercial enterprise on the one hand, and ever and anon to check on the other the skilfully-devised machinations of the fraudulent and evil-minded. In regard to trading companies of all descriptions, and however constituted—in regard to associations organized for the carrying out of public works, canals, railways, and the like—in regard to carriers by land and water, to factors and brokers—in regard to letters patent for inventions—and, lastly, in regard to bankruptcy, the law regulating which may justly be considered as offering the most remedial process known to the law merchant—in regard to each of these matters, important enactments have recently been passed, evincing the solicitude of successive Parliaments to aid the elasticity of our common law *pro beneficio commercii*, or to impose restraints upon it *pro bono publico*. Actuated by this laudable anxiety, let us hope that they will not be led *too far*—to legislate where there was no need of legislation, or wantonly to vex with change the admitted dogmas of our Customary law.

The remarks contained in the preceding pages having reference to various topics of interest connected with the history of our Law Merchant, are intended, for the behoof of the reader, as *suggestive*, merely—the object which we have proposed to ourselves in presenting them will have been accomplished if his attention has been successfully directed to the importance of the

study of this history—too much neglected at the present time as well by the practising lawyer as by the legislator. The former can have but a superficial idea of the reasons on which rest the doctrines of mercantile law if he confine his reading exclusively to our modern reports and operative statutes; the latter is wholly unsuited for his high vocation if he has omitted to store his mind with the records of the past, contenting himself with data and statistics drawn from what he sees before him. It will be our care, in discussing, as they present themselves, questions affecting trade and commerce, to examine them by the light of past experience, and with reference to analogies which it furnishes. It will be our duty, whilst analyzing projected legislative measures, to deal with them in no narrow or restricted spirit; to receive with caution and with jealousy arguments put forward for the advancement of *class* or *party* interests; to scrutinize them with the eyes of the historian as well as of the lawyer; to gather from the past, warnings or encouragement for the future.

B.

ART. II.—ON THE APPROPRIATION OF PAYMENTS.

IN this paper we propose to institute some inquiry as to the application of the maxims—*Quicquid solvitur, solvitur in modum solventis*—*Quicquid recipitur, recipitur in modum recipientis*. By way of introduction to our subject, let us, then, investigate generally the nature of a payment.

“*Payment*” denotes the specific performance of an obligation to give a sum of money to another. He to whom the money is owing is called *creditor*; he from whom it is due, *debtor*; and the sum itself, *debt*. The word debt is also used to denote sometimes the debtor’s obligation, and sometimes the correlative right of the creditor. According to the above definition, payment presupposes not only a sum of money due, but a sum of money which is either ascertained in amount, or at least capable

of being ascertained by a mere arithmetical process. It is obvious that an obligation to pay an unascertained sum cannot be specifically performed at all; until the amount of the money owing be definitively fixed, an obligation to pay cannot be determined by performance,¹ although it may be extinguished by release, or by accord and satisfaction, or in some other way. Again, where there is no obligation there can be no payment, but only a gift, loan, &c.² Where a right to a sum of money is determined otherwise than by the actual receipt of that sum, there is likewise no payment, in the proper sense of the word. The right may be extinguished in a mode more or less similar to payment, as by accord and satisfaction, where something other than the sum due is accepted in satisfaction of the right to that sum; or by set-off, where the right to a sum of money is extinguished wholly or partially by an obligation to pay another sum of money to the person from whom the first is due; but these modes of extinguishing a right depend upon principles and are governed by rules materially different from those applicable to payment.

With reference to the subject-matter of the present inquiry, it may be useful, although scarcely necessary, to remind the reader that the position of a creditor is not, juridically speaking, altered by a refusal to accept in satisfaction of his right, something other than that which is due to him, whilst his position is most materially altered by a refusal to accept payment. Such a refusal is, in point of fact, a refusal to allow the debtor to free himself from an obligation by that which, *ex hypothesi*, is a due performance of it. Refusal to accept a partial payment (sometimes called a payment on account), is, however, obviously very different from a refusal to accept complete payment, and is by no means attended by the same consequences. It is important to remember this. A creditor who has a right to a sum of 1,000*l.* is not, juridically speaking, prejudiced by a refusal to accept 50*l.* at one time, 100*l.* at another, and the residue at another. The

¹ However, when the sum is ascertained, it may be treated as if it had previously been so.

² A person who pre-pays is never indebted (*Smith v. Winter*, 21 L. J. C. P. 158); he anticipates his obligation.

creditor is under no obligation to allow his claim to be satisfied piecemeal, as may best suit the convenience of his debtor, and ought not to be and is not prejudiced by refusing so to do.¹ If, however, he does accept a partial payment, his claim is of course extinguished *pro tanto*. Payment, moreover, only presupposes an obligation on the part of the debtor; set-off, on the other hand, presupposes also a counter obligation of like nature on the part of the creditor. Payment is the direct liquidation of a debt due, or treated as due, at the time the payment is made; whilst set-off is the indirect liquidation of a debt by a counter-debt previously or subsequently contracted. Set-off never requires to be more carefully distinguished from payment than when the doctrines relating to the appropriation of payments have to be considered; and especially is it important to bear in mind that payment never creates an obligation, whilst that which gives rise to right to set-off always does.

A payment is said to be "appropriated," or, as continental writers say, "*imputed*," when the obligation of which it is a performance is finally ascertained and settled. If A owes B 100*l.*, and no more, and pays B 100*l.*, there is no room for doubt—the payment is evidently appropriated as soon as it is made, and the debt is extinguished. The only question which in such a case can arise, is, whether the 100*l.* given by A to B was a payment, or something else,—*e.g.* a gift or a loan: supposing it to be a payment (and the presumption is that way²) there can be no question as to what debt it extinguished. But if A owed B several sums of 100*l.*, and made a payment insufficient to liquidate them all, the question would arise, which debt is to be deemed extinguished? and this question is often one of considerable difficulty and importance, as will be obvious by supposing one of the debts to be barred by time, or to be secured, whilst another is unsecured. It is that branch of jurisprudence which determines the mutual rights of debtor and creditor in such cases that we propose to examine.

Those cases³ in which a person has money in his hands to dis-

¹ See Domat, *Lois Civiles* iv., tit. 1, § 1, No. 16; and § 4, No. 1.

² 1 Tay. Ev. 118; Best on Pres. 176.

³ Like *Williams v. Everett*, 14 East, 582; *Kilsby v. Williams*, 5 B. & A. 815; *Greenwood v. Taylor*, 14 Sim. 505; which are not cases of *payment*

tribute amongst several claimants, of whom perhaps he is one, do not fall within our province as above determined, although in their discussion the word appropriate is often made use of. They are referred to here to be excluded hereafter; for if confusion is to be avoided, and precision to be attained, the subject for investigation must be clearly defined and limited, and must not be departed from, and made to include matters which would never have been thought cognate, had it not been for a verbal ambiguity.

We proceed now to examine the mutual rights of debtor and creditor when a payment is about to be or has been made in respect of debts due from the former to the latter.

I.—*In the first place, then, let us inquire as to the Right of the Debtor.*

When a person is indebted to another on various accounts, the former has the option of paying which he likes first, and is at liberty to appropriate any payment he may make to whichever of the debts he chooses. This doctrine is evidently derived from the Roman law. Ulpian says :—“ *Quoties quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis, quod potius debitum voluerit solutum; et quod dixerit, id erit solutum.*”¹ This rule will be found laid down and acted upon in the cases cited hereafter, and was firmly established in the reign of Elizabeth, as appears from *Anon Cro. El.* 68, where it was held that, *in spite of the creditor*, a debtor was entitled to have a payment made by him appropriated to the account upon which he expressly made it.² The reason for this rule is variously given : Ulpian says :³—“ *Possumus enim certam legem dicere ei quod solvimus.*” Other writers refer it to the fact that the money actually transferred belongs to the debtor, who can part with what is his own on his own terms, or not all. It has already been observed, that were the rule otherwise, the law would lend its assistance to the prevention, on the part of the creditor, of the due performance of at all. They belong to that branch of jurisprudence which determines the priority of conflicting rights; or, as German writers say, the concurrence of rights.

¹ Dig. xlv. tit. 3, de Solut. l. 1.

² See, too, *Bois v. Cranfield*, Style, 239; *Chase v. Box*, Freeman. 261.

³ Dig. ubi sup.

the obligation to which the debtor is subject; and this is, perhaps, as satisfactory a reason as any.

The rule in question is not, however, one which obtains under all circumstances and at all times: for, first, it does not necessarily apply unless the payment is sufficient completely to extinguish the debt on account of which it is made; and, secondly, it applies only where the debtor appropriates the payment at the time he makes it. These limitations of the rule require further development.

1. A creditor is not prejudiced by refusing to accept a partial payment on account of a larger sum due.¹ If, therefore, he does not choose to accept a partial payment on the account upon which the debtor desires to make it, the creditor is in a position either to decline altogether to take the money, or to insist, if he takes it, upon applying it to the account which best suits himself. If a partial payment is accepted without objection, the inference naturally is that the creditor agrees to apply it to the account to which it was expressly or impliedly appropriated by the debtor, and the money must be treated as appropriated accordingly. But if at the time a partial payment is made, the creditor refuses to accept it unless he is allowed to appropriate it to some particular account, the inference, if the money is left with him, is, that the debtor agreed that the money should be appropriated in accordance with the declared will of the creditor. The rule, therefore, so broadly laid down, *Quidquid solvitur, solvitur in modum solventis*, applies only 1. Where the sum paid equals all that is due on the account on which it is paid; or, 2. Where the sum paid (being less than all that is due on the account on which it is paid) is received by the creditor without objection. In other cases the rule which applies is, *Quidquid recipitur, recipitur in modum recipientis*.²

2. By the law of this country the period within which a debtor can exercise his right of appropriation is very limited; so limited, that unless exercised at the time of payment his right to appropriate is gone for ever. The debtor is not indeed

¹ Dixon v. Clark, 5 C. B. 365.

² See the judgment in Webb v. Weatherly, 1 Bing. N. C. 505; and Mühlenbruch Lehrb. des Pand. R. § 470.

called upon to state expressly upon what account he makes the payment; that may sufficiently appear from other circumstances. But, notwithstanding an opinion to the contrary, reported to have been expressed by Lord Kenyon at *Nisi Prius*,¹ the law appears to be clearly settled that the right of the debtor to appropriate a payment must be exercised, if at all, at the time the payment is made, and not afterwards.²

This rule may be thought extremely harsh, but it must not be forgotten that in the generality of cases payments on account are not equal to what is owing on any account in particular, and that therefore it more commonly occurs than not that the debtor has no right at any time to insist on an appropriation to which his creditor would not assent. In the majority of cases a contrary rule would be extremely prejudicial to the creditor, as it would deprive him of the opportunity of objecting at the fitting time to receive a payment on the account desired by the debtor. And with regard to payments which are not partial, when it is considered that payment of a sum exactly equal to what is due on any particular account goes far to show an appropriation by the debtor to that account, the rule will by no means be found to be so harsh upon the debtor as at first might be supposed. Whether, however, the rule be thought justifiable or not, the cases already cited and those which will be presently referred to, show that it is acted upon with great strictness by English judges.

II. *We will in the next place speak of the Right of the Creditor.*—If the debtor when he makes a payment does not appropriate it to any debt in particular, the laws of England³ and of most countries agree in conferring a right of appropriation upon the creditor. The extent of this right as well as the time at which it must be exercised require to be examined.

1. As regards the time at which the creditor can exercise his

¹ *Hammersley v. Knowlys*, 2 Esp. 666.

² *Manning v. Western*, 2 Vern. 606; *Wilkinson v. Sterne*, 9 Mod. 427; *Bowes v. Lucas*, Andr. 55; *Hall v. Wood*, 14 East, 243, note c; *Peters v. Anderson*, 5 Taunt. 596; *Mayfield v. Wadsley*, 3 B. & C. 357.

³ See *Manning v. Western*, 2 Vern. 607; *Hall v. Wood*, 14 East, 243, note c; *Peters v. Anderson*, 5 Taunt. 596; *Campbell v. Hodgson*, Gow. 74.

right, the Roman law¹ expressly declares that he must make the appropriation at the time of payment: *Permittitur ergo creditor constituere, in quod velit solutum, . . . sed constituere in re præsenti, hoc est statim atque solutum est*. This rule, however, does not prevail in this country.² In the well known case of *Peters v. Anderson* (5 Taunt. 596), the creditor was held to have appropriated a general payment by the mode in which he framed his action. In *Simson v. Ingham* (2 B. & C. 65), Best, J. thought the creditor had only a reasonable time; but in the later case of *Philpott v. Jones* (2 A & E. 41), it was expressly decided by Lord Denman and the other judges of the Court of Queen's Bench, that the appropriation of a general payment might be made by the creditor *at any time*, at least at any time before action. This decision has been approved by the Court of Common Pleas.³ Moreover, no appropriation by the creditor is binding until communicated to the debtor;⁴ and, therefore, until such communication has been made, a creditor can change his mind as often as he likes. *Simson v. Ingham* (2 B. & C. 65) is the leading authority for this doctrine, and has never been doubted.⁵

Upon the whole, therefore, we conclude that a creditor can exercise his right of appropriation at any time he pleases, but that when once he has, by bringing an action or otherwise, notified to his debtor what appropriation has been made, no different appropriation is allowable.

2. As regards the debt to which the creditor can appropriate a general payment, the Roman law lays down as its fundamental principle, that the creditor must act towards his debtor as he would have the debtor act towards him if their relative position were reversed;⁶ and it is only in cases of comparative indifference to the debtor that the creditor is allowed to make such appropriation as he pleases: *Quoties vero non dicimus id, quod*

¹ Dig. xlv. tit. 3 l. 1.

² Quære if it ever did? See the dictum of Tindal C. J. in *Smith v. Wigler*, 3 Moore & Sc. 175.

³ *Mills v. Fowkes*, 5 Bing. N. C. 455.

⁴ *Simson v. Ingham*, 2 B. & C. 65.

⁵ See, too, *Grigg v. Cocks*, 4 Sim. 438; *ex parte Johnson*, 3 De G. Mc. & G. 218.

⁶ Domat iv. 4, § 2.

*solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat, dummodo in id constituat solutum, in quod ipse, si deberet, esset soluturus, quoque debito se exoneraturus esset, si deberet. . . . Equissimum enim visum est creditorem ita agere rem debitoris, ut suam ageret.*¹

To what extent this rule was carried is not clear; it could, however, only apply where a payment was attempted to be appropriated by the creditor adversely to the interest of his debtor, and without his knowledge. The rule could not apply if the appropriation were attempted to be made in spite of the wish of the debtor, for, as we have seen, he had the option of making such appropriation as he liked, and the creditor's right could only be exercised *statim atque solutum est*; nor could the rule apply if the debtor, knowing of the appropriation, were silent, for silence under such circumstances would be deemed consent.

According to the law of our own country, a creditor is by no means bound to make such an appropriation as best suits the convenience of his debtor. The debtor can take care of himself by stating in liquidation of what debt he makes a particular payment; and if he does not either expressly or impliedly exercise this right, the creditor can appropriate a payment to the discharge of whatever debt he pleases;² provided, of course, it be owing from the person by or on whose behalf the payment is made. To such an extent is this allowable, that a debt, payment of which cannot be actively enforced, may be liquidated by a creditor in preference to a debt which the debtor could by action be compelled to pay. Thus, if one of two debts be barred by the Statute of Limitations, the creditor is at liberty to appropriate a general payment in liquidation of the barred debt.³ Moreover, the debts need not be of an equally high nature; whether they are or not is wholly immaterial. In

¹ Dig. xliv. tit. 3, de Solut. l. 1.

² See, in addition to the cases presently referred to, *Campbell v. Hodgson*, Gow, 74; *Morgan v. Jones*, 1 Bro. P. C. 32.

³ *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffiths*, 5 M. & W. 300; *Nash v. Hodgson*, Kay, 650. Such an appropriation cannot, however, be deemed an admission by the debtor that the barred debt is due, and consequently does not take the debt out of the statute. See, too, the case of *Philpott v. Jones*, 2 A. & E. 41, and *post*.

Peters v. Anderson, 5 Taunt, 596, and *Chitty v. Naish*, 2 Dow. 511, the creditor was allowed to appropriate a general payment to a simple contract debt in preference to a specialty debt,¹ and as, in both instances, the specialty was the older of the two debts, the same cases are authorities to show that the creditor's right of appropriation is independent of the relative ages of his demands.²

The creditor's right prevails even as against a surety: for if a person has two demands against the same debtor, and one of them is secured by a surety, a payment made generally by the principal debtor may be applied by the creditor to the liquidation of the other demand,³ for which the surety is not liable; and, consequently, the surety may then be sued for the whole of the debt for which he is responsible, less, of course, the excess, if any, of the sum paid, over and above the debt to which the payment has been applied by the creditor. The surety cannot effectually urge that the debtor must be presumed to have performed his obligation to him by paying off the guaranteed debt rather than some other.⁴

In conformity with the rule of the civil law, it was indeed held, in an old case (*Heyward v. Lomax*, 1 Vern. 23), that a creditor could not appropriate a general payment to the discharge of a debt not bearing interest in preference to a debt on which interest was running, "because it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on account for which no interest is payable." Notwithstanding this natural supposition, the cases already referred to show conclusively that

¹ See, too, *Chase v. Cox*, Freem. 261; *Brazier v. Bryant*, 2 Dowl. 477, *contra* Vin. Ab. Paym. M. 9.

² In *Wentworth v. Manning*, 2 Eq. Ab. 261, this proposition appears not to have been admitted.

³ *Ex parte* Whitworth, 2 Mont. Deac. & De G. 164; *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Plomer v. Long*, 1 Stark. 155. *Perris v. Roberts*, 1 Vern. 34; and *Marryatts v. White*, 2 Stark. N. P. 101, are not opposed to this. Nor is *Parr v. Howlin*, 1 Alc. & Nap. 196.

⁴ In *ex parte* Whitworth, 2 Mont. Deac. & De G. 164, Sir J. Cross seems to have thought that the doctrines of appropriation applied only as between the debtor and creditor; and that when the interests of other persons were concerned, different principles ought to be resorted to. This view has not, however, been taken by other judges.

the creditor is not called upon to consult his debtor's interest. *Heyward v. Lomax*, moreover, is directly opposed to what was held by the Lord Keeper in *Chase v. Box* (Freem. 261),¹ and is in principle also opposed to all the modern cases, in which the creditor's right to appropriate has been upheld. The case of *Heyward v. Lomax*, it is therefore submitted, cannot now be considered as law.

Having thus stated and illustrated the general principle according to which the creditor can make such an appropriation of a general payment as best suits his own convenience, it is necessary to examine the real and apparent exceptions to the rule.

First.—The rule presupposes that the debtor has not himself appropriated the payment.² Those cases, therefore, where an actual appropriation by him is presumed or inferred, and where, consequently, a different appropriation by the creditor cannot be allowed, are excluded from the operation of the rule, but are not, properly speaking, exceptions to it. Instances of presumed appropriation are afforded by the cases of *Meggot v. Wilson* (1 Lord Raym. 286) and *Dawe v. Holdsworth* (Peake, N.P. ca. 64), where Lord Holt, and Lord Kenyon on his authority, held that if two debts are owing by a person, and he could be made bankrupt in respect of one of them, but not in respect of the other, a payment made by him generally is to be deemed to have been made in liquidation of the former, and not of the latter debt. By this, all that is meant appears to be, that there is a presumption of appropriation by the debtor, and that such presumption is not rebutted by proof that there was not, in fact, any *express* appropriation. It must be remembered that in Lord Holt's time bankruptcy was regarded as little short of a crime, and the presumption alluded to was a presumption in favour of innocence.³

The cases of *Meggot v. Mills*, *Heyward v. Lomax*, and some

¹ See, too, *Manning v. Westerne*, 2 Vern. 606.

² In cases not falling within the classes next noticed in the text, an intention on the part of the debtor to appropriate his payment goes for nothing if it is not communicated to the creditor; *Manning v. Westerne*, 2 Vern. 605.

³ See the observations of the court on these two cases in 5 Taunt. 602.

others, certainly show that our judges were formerly much more inclined than now to protect the debtor from a prejudicial appropriation by his creditor. The lenient doctrine of the civil law was evidently that tacitly adopted in the early stages of our commercial law; but it has as evidently long been disregarded.

Instances where a payment made generally may nevertheless be inferred to have been made on some particular account, and so, in fact, to have been appropriated by the debtor, may easily be imagined; many such cases are to be found in the books,¹ and from them several secondary rules of considerable importance may be deduced. These rules, however, being founded on inference, are inapplicable where the inference on which they are based is excluded by surrounding circumstances. Moreover; each case turning on its own peculiar facts, it is impossible, after forming groups of cases, to abstract any characters common to all the groups, except these, viz. absence of express appropriation by the debtor, and presence of circumstances which nevertheless justify an inference of appropriation by him. Premising that the cases already referred to show conclusively that from the mere fact that appropriation in one way would be most to the advantage of the debtor, no appropriation in that way is inferred to have been made by him, we proceed to examine those cases in which appropriation by the debtor has been inferred.

1. One of the earliest rules laid down was, that where a principal sum is due, and interest upon it is in arrear, a general payment is to be deemed to have been made in liquidation of the arrears of interest, and not of the principal.² As compound interest was not allowed, this inference was evidently to the disadvantage of the debtor. The rule, however, is reasonable, inasmuch as no creditor would think of accepting a sum in part-payment of a principal until the interest upon it had been liquidated.

2. When the money received by the creditor arises from the

¹ See, in addition to the cases cited hereafter, *Shaw v. Picton*, 4 B. & C. 715; *Perris v. Roberts*, 2 Vern. 34; *Marryatts v. White*, 2 Stark. N. P. 101.

² *Vin. Ab. Paym. M.* 4; *Haynes v. Harrison*, 1 Ch. Ca. 105; *Chase v. Box*, *Freem.* 261; *Bostock v. Bostock*, 8 Mod. 242; *Bower v. Marriis*, *Cr. and Ph.* 351.

sale of a security given for a particular debt, the money is ordinarily to be treated as a payment on account of the same debt.¹

3. When money is handed over by a debtor to his creditor, such money is inferred to be a payment on account of then existing liquidated debts, and not to be a deposit to secure future debts; and the creditor is not therefore allowed to appropriate such money except to debts owing to him at the time he received it. The only authority for the latter part of this rule appears to be the case of *Hammersly v. Knowlys* (2 Esp. 666). The case, as reported, is not very clear; it seems, however, to have been one of banker and customer, and that the latter, being indebted to the former, made a general payment on account, and then became further indebted. The banker, upon the subsequent insolvency of the customer, sued a third person upon accommodation acceptances, which had been given to the banker as a security for the first contracted debt; the defendant insisted that that debt had been paid, whilst the banker contended that he had a right to appropriate the payment, which had been made generally, to the discharge of the subsequently contracted debt. This, however, Lord Kenyon would not allow, on the ground that it would be too much to say that a payment made generally was not a payment, but a deposit.² Upon a similar principle, a payment made generally was held to be applicable only to a debt ascertained in amount, and not to a debt the amount of which was wholly uncertain, and could only be determined by taking a partnership account.³ Both these cases are founded upon the rule that money received by a debtor from his creditor is *prima facie* a payment in the proper sense of that word.

Here it may be as well to direct attention to a distinction between the appropriation of a payment and the appropriation of a security or its proceeds. It has just been seen that the creditor cannot convert a payment of an existing debt into a

¹ *Brett v. Marsh*, 1 Vern. 468; *Young v. English*, 7 Beav. 10. *New-marsh v. Clay*, 14 East, 239, was decided upon a similar principle.

² It must not be concealed that there was here only a single current account, in which the debt in dispute appeared as an early item.

³ *Goddart v. Hodges*, 1 Cr. & M. 33.

security for a future debt, and cannot therefore appropriate a payment, although made generally, to a debt contracted after the payment was made. But it has been held that, on the bankruptcy of a debtor, his creditor can apply any general securities in his hands, or the proceeds of such securities, in whatever manner best suits his own purpose, and even to claims which have arisen after the securities were given. This doctrine was settled by Lord Eldon, in *ex parte* Hunter, (6 Ves. 94);¹ and was acted upon in the late case of *ex parte* Johnson, (8 De G. Mc. & G. 218). It often enables a creditor to avail himself of a security, by applying it to an unliquidated claim which he could not prove against the bankrupt's estate, and then to prove for a debt, without setting off against it the value of the security. The principle of the cases just cited seems to be satisfactory. On the one hand, the creditor has several claims against the bankrupt; and, on the other hand, the latter has a claim against the creditor in respect of the securities held by him. These cross claims more or less neutralise each other; the difference between the value of the securities held by the creditor, and the sums owing to him, determines which of the two parties is upon the whole the debtor of the other; and until the balance is struck, *i.e.* until the creditor has been allowed to set off *all* his claims against the value of his securities, he cannot be said to be indebted to the bankrupt's estate. The doctrine arises from the application of the liberal principle, "he who will have equity must do equity," and from the non-application in bankruptcy of the absurdly strict legal rules concerning set-off. The above reasoning is obviously inapplicable to cases of appropriation of *payments*, inasmuch as a payment is in discharge of an obligation on the part of the debtor, and gives him no claim against the creditor; cross claims do not, in fact, arise.

4. Where a person is indebted in two capacities, *e.g.* on his his own account and also as the representative of another, a general payment is, in the absence of evidence to the contrary, inferred to have been made in discharge of the liabilities incurred by the payer himself, and the creditor is not therefore at liberty to appropriate such a payment to the discharge of a liability of

¹ See, too, 1 Cooke's Bankr. Laws, 4th ed. 120.

the other class. This was settled by the case of *Goddart v. Cox* (2 Str. 1194). There the debtor was liable—1. For a debt contracted by himself; 2. For a debt contracted by his wife, *dum sola*; 3. For a debt owing by her as executrix. C. J. Lee held that the defendant having paid money to the plaintiff generally on account, the plaintiff was entitled to ascribe such payments either to the first or the second debt, but not to the third. Of course circumstances may exist which show that the payment was not made in discharge of the private liability of the payer. Thus, in *Thompson v. Brown* (Moo. & M. 40), a payment made with partnership money to a person who was a creditor both of the firm and of the individual partner making the payment, was naturally imputed to a partnership debt. So in *Bowes v. Lucas* (Andr. 55), a general payment of rent by a person owing rent as executor and also as assignee, was held to have been made by him as executor; the form of the receipts warranting such an inference.¹

5. Another and most important instance of inferred appropriation by the debtor is afforded by those cases where there is only one single open current account between the debtor and his creditor. In such cases, a payment made generally on account, is, in the absence of evidence to the contrary,² deemed to be made in satisfaction of the *earliest items* in the account; and the creditor is consequently not allowed to make any other appropriation, unless he can show some special reason justifying him in so doing. This doctrine was firmly established by Sir William Grant in *Clayton's case* (1 Mer. 585), which is the leading authority upon the point, and the judgment in which deserves a most careful perusal. *Bodenham v. Purchas* (2 B. & A. 39), and many other cases, have since been decided upon the same principle.³ In *Williams v. Rawlinson* (3 Bing. 71), the doctrine in question was held to apply even to the prejudice of the debtor's surety, who in vain contended that a general payment ought to be appropriated to the debt which he had guaranteed; and in the late important case of *Pennell v. Deffell*

¹ See, too, *Sternedale v. Hankinson*, 1 Sim. 393.

² 4 B. & Ad. 466—467, and see *post*.

³ See the Synopsis of cases, *post*.

(4 De G. Mc. and G. 372), the rule was further adhered to, although persons for whom the debtor was trustee were thereby deprived of a considerable sum of money. In *Pennell v. Deffell cestuis que trustent* attempted to follow their money into the hands of the bankers of their trustee: the money was traced to the bankers, was found on the credit side of the trustee's account at the bank, and was held, according to the rule in Clayton's case, to have disappeared so far, but so far only, as the payments out by the banker had diminished it after having exhausted all the sums previously paid in. The L.J. Turner, in his judgment, says,—“I take it to be now well settled, that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust-moneys paid in by the customer, so much of those trust-moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust-moneys subsequently paid in remain unaffected. The same principle runs through the whole account: each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust-estate is entitled.”

The rule in Clayton's case, it will be observed, obtains only upon the supposition that there is no evidence from the usual course of business or otherwise to show in discharge of what particular itema payment was made. The rule is by no means one which, like a *presumptio juris et de jure*, is applied rigourously and independently of intention.¹ In the following cases, although there was a single open current account, there was evidence to show in respect of what in particular a general payment was

¹ See 4 B. & Ad. 766—767, *Wilson v. Hirst*.

made, and the rule in Clayton's case was consequently not applied. See *Stoveld v. Eade* (4 Bing. 154); *Taylor v. Kymer* (3 B. & Ad. 320); *Lysaght v. Walker* (5 Bli. N.S. 1).

In applying the rule in Clayton's case, the right of a creditor to refuse a partial payment must not be forgotten. If the creditor accepts a partial payment without dissent he is, as already observed, bound to apply it for the purpose for which it is paid, and whether that purpose be expressed or implied is immaterial. If, then, there be a single current account between a debtor and his creditor, and a general partial payment be made and accepted without objection, the rule in Clayton's case applies, and the creditor cannot afterwards make a different appropriation. But if the creditor refuses to accept a partial payment unless it be applied to the liquidation of some particular debt, and if, after such a refusal, the money is left with him, the inference would be that the debtor acquiesced in making the payment on the account desired, and Clayton's case would not apply. These remarks appeared necessary in order to reconcile the observations of Lord Lyndhurst, in *Pemberton v. Oakes* (4 Russ. 154), and of Tindal, C. J. in *Smith v. Wigler* (3 Moore & Scott, 175), with the view above taken of Clayton's case. Both those learned judges observe, that the rule laid down by Sir Wm. Grant only applies if there has been no express appropriation by the debtor *or the creditor*; and as we have already seen that the creditor is not bound to make an appropriation within any fixed time, it might have been thought that the rule in Clayton's case would scarcely ever be applicable, or that, being founded on an appropriation by the debtor, it ought to obtain in spite of the creditor. Clayton's case and the rule established by it depend, however, upon a presumption: "presumably it is the first sum paid in that is the first drawn out;" in other words, a payment in respect of one entire current account is inferred to have been made by the debtor in liquidation of the earliest items to his debit. But this inference would be rebutted, and the rule would not therefore apply if, at the time when a partial payment was made, the creditor insisted on having it applied to some item in particular.

Such cases as *Pease v. Hirst* (10 B. & C. 122) and *Henniker v.*

Wigg (4 Q. B. 793), although sometimes referred to as instances where the rule in Clayton's case has not been applied, in truth illustrate a different branch of the law. In each of these two cases the question was, whether a certain security was or not at an end, as it would have been, by the rule in Clayton's case, if it had been given in respect of the earliest of several debts. The Court held that the securities were given not for any debt in particular, but generally as continuing securities for any balance which might be due, and that therefore Clayton's case did not apply *so as to extinguish the securities*. These decisions are evidently foreign to the matter in hand.

6. The last class of cases in which a general payment is inferred to have been made on account of some particular debt, consists of those where a debtor, being in insolvent circumstances, his assignees or trustees make a payment of so much in the pound to every creditor. If a creditor has several demands and receives so much in the pound upon the total amount of his claims, what he receives is considered as paid as much in respect of one debt as of another, and he therefore cannot appropriate the dividend received to the satisfaction of one debt more than of another, but must apply the whole dividend to all the debts *pro rata*.¹ Consequently, also, if one of the debts is secured by a surety, the surety cannot insist upon the whole dividend being applied by the creditor in satisfaction of that debt, nor can the creditor apply the whole dividend to an unsecured debt; the dividend must be apportioned rateably between the two, and the surety is answerable, and answerable only, for the amount of the debt guaranteed less the dividend paid in respect of it.¹ The same rule of appropriation *pro rata* applies of course where, in the absence of insolvency, it can be gathered from the conduct of the parties that a general payment was intended as a payment on account of each debt. Such was the case of *Perris v. Roberts* (1 Vern. 34), *aliter*, *Bevis v. Roberts* (2 Ch. Ca. 83), where two debts had been cast into one account, and a bill of sale given in respect of the amount of

¹ See *Bardwell v. Lydall*, 7 Bing. 489; *Raikes v. Todd*, 8 A. & E. 846; But arrears of interest are to be discharged before any part of the principal *Bower v. Marris*, Cr. & Ph. 351.

both had been realised by the creditor. The Master of the Rolls and the Lord Chancellor both held that a surety for one of the debts was entitled to have the proceeds of the bill of sale applied rateably to both, and that the creditor had no right as against the surety to apply the whole proceeds to the discharge of the debt for which he was not responsible. We may, perhaps, be allowed to express a doubt whether the conclusion in this case would not have been different if it had occurred a century or so later. The case furnishes another example of the influence of the Roman law at the period of the decision.

Secondly.—The extensive right of appropriation which the law confers upon creditors, presupposes the existence of more than one valid debt. We have already seen that the creditor may appropriate a general payment to a debt barred by time; but the statute of James upon which the cases deciding this doctrine turned has often been declared only to bar the remedy by action or suit, and not to extinguish the right to payment if there be any other mode of enforcing it. Where, however, one of the so-called debts has no juridical existence, where it imposes no obligation on the debtor, and consequently confers no right on the creditor, there the creditor cannot be allowed to apply a general payment to its liquidation; ¹ to allow him to do so would be at the same time to admit and deny the existence of one and the same right.

Upon this principle, accordingly, it was held in *Wright v. Laing* (3 B. & C. 165), that the creditor could not appropriate a general payment to the liquidation of a claim invalid on the ground of usury. So in *Lampbell v. Billericay Union* (3 Ex. 283), it was held that a creditor could not appropriate a general payment to the liquidation of a demand arising from work done for a corporation but for which work the corporation could not be called upon to pay, there having been no contract under the corporate seal. ² These cases have been supposed irreconcilable with *Philpott v. Jones* (2 A. & E. 41). There, a publican was

¹ *Ex parte Randleson*, 2 Deac. & Ch. 534.

² This case is, however, directly opposed to *Arnold v. Poole* (4 Man. & Gr. 860), and is one of the many disgraceful modern cases in which corporations have been allowed to take advantage of their own wrong.

allowed to appropriate a general payment to the liquidation of a debt owing for spirits sold in smaller quantities than those for which a person is allowed by the Tippling Act to sue. But the Tippling Act merely says, that *no person shall sue for or recover*, either in law or equity, any debt for spirituous liquors, unless the debt is contracted at one time to the amount of twenty shillings or upwards. In this respect the Tippling Act resembles the statute of James for the limitation of actions and suits; both statutes deprive a creditor of active judicial assistance, but both allow him to assist himself if he can. *Philpotts v. Jones* is clearly, therefore, not an authority for the statement that a person can appropriate to the satisfaction of a juridically non-existing debt, money which has been paid him generally on account. *Crookshank v. Rose* (5 Car. & P. 19) is another case on the Tippling Act, and is equally open to the above remarks.

As, until recently, an equitable obligation was not recognised at law, it was held in *Birch v. Tebbutt* (2 Stark. N. P. 74), and by Bayley, B., in *Goddart v. Hodges* (1 Cr. & M. 88), that a creditor could not be permitted by a court of law to apply a general payment to the liquidation of a demand purely equitable. Even admitting that these cases were decided by a strictly logical application of the rule in question, the decisions may be regretted as adding to the number of cases in which law and equity conflict. Now, however, that equitable rights and obligations are not ignored at law, a different doctrine will no doubt be established. *Bosanquet v. Wray* (6 Taunt. 597), which is sometimes thought opposed to the last two cases, fell within the rule of Clayton's case, as the equitable debts formed the earliest items of what the Court held to be a single current account. The marginal note by Taunton has probably led to the opinion noticed, and is certainly calculated to mislead.

James v. Child (2 Cr. & J. 678), although not falling strictly within the principle now under discussion, seems to be more closely allied to the cases just referred to than to any others. There the Court held that a solicitor having an open unsettled account with his client had no right to make two bills, putting all the taxable items in one, and all the non-taxable items in the other, and then to apply a general payment to the liquidation of the

first bill in order to sue solely on the second. The client had a right to have all the items in one bill, and to refer the whole for taxation.

Thirdly.—The general right of the creditor, which has been examined, is a right to appropriate a payment which the debtor himself might have appropriated if he had thought proper, but which he did not, in fact, either expressly or impliedly, or by presumption, pay on any account in particular. The creditor's right does not arise unless the debtor had an opportunity to exercise his right; and, consequently, in *Waller v. Lacy* (2 Man. & Gr. 54), the Court would not suffer an attorney to appropriate in part satisfaction of his bill a sum of 17*l.* which he had received from a debtor of the defendant, but without his knowledge. Tindal, C.J., there said, "It is not disputed that as regards a payment where the party paying does not appropriate the money, the party receiving it may; for it is the fault of the payer if he omit to exercise the right of appropriation of the sum so paid. But this is not the case of a payment at all, but of a sum of money received without the knowledge of the defendant. Therefore, as the latter never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose." Upon a similar principle it is held, that the produce of a security must be applied to liquidate the debts for which that security was expressly given, and no others,¹ and they must be liquidated according to their priority; the produce of the security being, in fact, treated as the security itself.²

Having now passed in review all the cases of any importance relating to the appropriation of payments as defined at the beginning of this inquiry, it may be useful concisely to recapitulate the principal rules deducible therefrom.

Using the word debt to denote a sum of money owing by one person to another, and the amount of which is either ascertained or ascertainable by mere computation; and using the word payment to denote the transfer of a sum of money by a debtor

¹ Subject to the doctrine of tacking.

² *Brett v. Marsh*, 1 Vern. 468; and see *Greenwood v. Taylor*, 14 Sim. 505; *Young v. English*, 7 Beav. 10.

to his creditor, in complete or partial satisfaction of the latter's claims against him; it appears that by the law of this country:

1. A debtor may pay in full whichever of several debts he likes; and if, when he makes a payment in full, he states on account of what debt he makes it, the payment can be applied to that debt and no other.

2. A creditor has a right to insist upon applying a partial payment to any debt he pleases; but if, when the partial payment is made, he accepts it without objection, the payment must be applied to that debt on account of which the debtor made it.

3. A payment which is not, when made, appropriated to any debt in particular, may at any time be applied by the creditor to any debt existing at the time of payment; and no appropriation by him is considered final until communicated to the debtor.

4. In the absence of sufficient reason to the contrary, a payment is inferred to have been, and is to be treated as having been, appropriated, when made, to the discharge, in the first instance,—

Of the debt for which the debtor is responsible in his own private capacity;

Of a debt then due, rather than of an unascertained sum claimed by the creditor, or of a debt not then payable;

Of a debt upon which the debtor might then have been made bankrupt;

Of the then arrears of interest;

Of the earliest of several items which together form one entire account;

Of all debts *pro rata* when the payment is a dividend of so much in the pound.

Further, it may be gathered from the decided cases, that the right of the creditor is a right which, if it arises at all, is wholly independent of the will of the debtor, and cannot be considered as a permission or license granted by him; for if it were, it would lead to the absurdity of inferring a tacit license to do that which is most disadvantageous to the person supposed to grant it, and would further lead to a doctrine which is clearly

not law,¹ viz, that an appropriation by the creditor of a general payment would be sufficient to take the debt to which the appropriation is made, out of the Statute of Limitations. Nor do the cases warrant the notion that, under certain circumstances, *the law* appropriates a general payment to one debt rather than another; and still less is it true, that the law appropriates such a payment in the way most beneficial to the debtor, or according to the justice and equity of the case. The law, in this country, it is submitted, makes no appropriation whatever, and the appropriations said to be made by it are neither more nor less than the appropriations made by the debtor, and evidenced, not indeed by his express words, but by circumstances which leave but little doubt as to what his intention really was.

Such, then, being the law of our country in regard to the subject-matter of this article, we shall proceed briefly to compare it with the laws of other communities, who are, at least, as likely as ourselves to have arrived at reasonable rules with reference to it. The subjoined extracts are inserted as well to show the influence which the doctrines of the Roman Law have had upon the jurisprudence of Scotland, France, and Germany, as to enable the reader, without difficulty, to see the main points of resemblance and difference between the laws of those countries and his own. With a view, moreover, to render the present paper as useful as possible to the English student and practitioner, we have appended to it a classified table of cases strictly bearing on the subject of the appropriation of payments, and calculated fully to elucidate it.

The heads of the Roman Law² bearing upon the subject here treated of are as follow:—

According to that law, when a person is indebted to another upon several accounts, and pays him a sum of money, the question arises, to which of those accounts is the payment to be imputed? The following distinctions are here to be taken:

I.—The debtor actually pays money to his creditor—

¹ *Nash v. Hodgson*, Kay 650.

² Translated from Thibaut *System des Pand. Rechts*, § 594, 9th ed.; see, too, Molitor, *Les Oblig. en Droit Romain*, vol. iii. p. 216, &c.

1. If the debtor expressly states upon what account the payment is made, both parties are bound by that statement.¹

2. If the debtor does not expressly make the payment upon any account in particular, the creditor is at liberty, at the time the payment is made, to impute it to whichever debt he pleases; but with this qualification, that if the debts are unequally burdensome on the debtor, the most burdensome of the debts must be first liquidated.² If, however, the creditor makes no appropriation at the time the payment is made, he cannot do so afterwards, and the payment must in that case be appropriated as follows: To arrears of interest; to debts actually due; to debts incurred by the debtor on his own account, in preference to others; then to the oldest debt; and, lastly, to that which presses most heavily on the debtor.³ If all the debts are similar to each other, the payment is to be applied to all of them *pro rata*.⁴

II.—If the creditor pays himself (by a sale of a security), he can liquidate whichever debt he likes.⁵

*The Law of Scotland*⁶ upon the subject before us is as under:—

Indefinite payments, where several debts are due, are applied thus:—

I.—The debtor may, in making the payment, appropriate it to a particular debt; under this limitation, that the creditor cannot be compelled to take a partial payment.

II.—If there be no distinct appropriation by the debtor, the creditor, by his receipt, may appropriate it.

III.—If there be no such appropriation by either, the creditor may ascribe it to which debt he pleases; to interest, for example, and not to the principal debt; or to the worst secured debt; or to a debt bearing no interest instead of one on which interest

¹ Dig. xlv. tit 3, de Solut. l. 1.

² Ibid. l. 1, l. 3, l. 89, § 2.

³ Ibid. l. 1, l. 3, § 1; l. 4, l. 5, pr.; l. 7, l. 97, Cod. viii. tit. 43, de Solut. l. 1.

⁴ Dig. ib. l. 1.

⁵ Dig. ib. l. 101. Some qualifications as regards mortgagees are contained in ib. l. 5, § 2; l. 48, l. 96, § 3.

⁶ Bell's Principles, § 563, 4th ed.

runs; or to a debt in danger of prescribing, leaving a more recent one unpaid. Nay, it has even been held that he was not bound to apply it to a debt which he was employed to recover. But,

IV.—This is to be received under the equitable limitation, that the debtor shall not, by such appropriation of the creditor, be left exposed to penal consequences, nor have the payment ascribed to a disputed debt; nor a cautioner deprived of the benefit of the payment where the debtor is insolvent; nor a payment, as understood at the time of payment, ascribed differently on emerging circumstances; nor a dividend from a sequestered estate applied otherways than to the whole debt.

From the French CODE CIVIL may be extracted, for the use of the reader, the following articles :—

§ 1253. A person who owes several debts, has the right to declare when he makes a payment what debt he intends to liquidate.

§ 1254. A person who owes a debt which carries interest or runs more and more in arrear, cannot, without the consent of his creditor, impute a payment to the principal in preference to the interest due, or to the arrears. A payment made on account of principal and interest, but which payment is not sufficient to liquidate both, is to be applied first to the interest.

§ 1255. If a person who owes several debts accepts a receipt by which the creditor declares that he has appropriated the payment to some debt in particular, the debtor cannot require a different appropriation to be made, unless there has been fraud or surprise on the part of the creditor.

§ 1256. If no appropriation is made by the receipt, the payment is to be applied to that debt actually due which it was most to the debtor's interest to discharge; but a debt actually due must be liquidated before one which is not, although the last may be the most onerous.

If the debts are all of a similar nature, that which has been due the longest must be first liquidated; and if they are all alike in every respect the payment must be applied to all *pro rata*.

In the Austrian Code¹ we find as follows :—

Sect. 1415. A creditor is not obliged to accept payment of a debt by instalments or a payment on account. If, however, several debts are due, then, unless the creditor objects, a payment is to be imputed to that debt which the debtor has expressly declared it to be his will to pay. And,

Sect. 1416. If it be doubtful what the will of the debtor was, or if he and his creditor do not agree, then a payment must be imputed to arrears of interest in preference to principal; and, of several principal sums, to that repayment of which has been required by the creditor, or which at least is actually payable, and afterwards to that which presses most heavily on the debtor.

The Prussian Code² contains the following Sections pertinent to the subject before us :—

§ 150. When a payment is made to one person by another indebted to him upon various accounts, the understanding between the parties themselves decides to which account the payment is to be imputed.

§ 151. If the debtor has made the payment expressly on account of one particular debt, and the creditor has accepted that payment without making any objection within the period mentioned in tit. 5, § 91 *et seq.*,³ reckoned from the receipt of the money, the payment cannot afterwards be imputed to any different debt.

§ 152. If the creditor has expressly appropriated a general payment to a particular debt, and the debtor has made no objection within the above-mentioned period, reckoned from his acceptance of the creditor's receipt, such appropriation is to be deemed final.

§ 153. If no understanding has been come to between the

¹ Das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie.

² Allgemeines Landrecht für die Preussischen Staaten, ed. 1832, part i. tit. 16.

³ The title referred to lays down with considerable minuteness the periods within which claims must be asserted and objected to, but does not contain anything specially applicable to appropriation of payments.

parties, a payment must in the first instance be applied in liquidation of arrears of interest.

§ 154. But if the debtor owes money for costs, these must be discharged even before arrears of interest.

§ 155. Amongst several principal sums due, that is to be first discharged which the creditor first required to be paid.

§ 156. If there is no difference in this respect, the creditor can apply a payment to that debt for which he has the least satisfactory security.

§ 157. If, again, the debts are all alike in this last respect, the payment must be appropriated to that debt which, on account of the interest it carries, is most burdensome to the debtor.

§ 158. If none of the above rules are applicable, the debt which has been longest due is to be the first liquidated.

§ 159. If this rule cannot be applied, the payment must be appropriated to all the debts *pro rata*.

The following SYNOPSIS OF CASES relative to the appropriation of payments, is submitted as likely to prove useful to the practitioner, and as affording means for testing the accuracy of some of the propositions and suggestions contained in the foregoing pages.

SYNOPSIS OF CASES.

I.—RIGHT OF THE DEBTOR—

To appropriate in the first instance.

Anon, Cro. El. 68.

Bois v. Cranfield, Style, 230.

Chase v. Box, Freem. 261.

To appropriate at the time of payment, but not afterwards.

Manning v. Westerne, 2 Vern. 606.

Wilkinson v. Sterne, 9 Mod. 427.

Bowes v. Lucas, Andr. 55.

Hall v. Wood, 14 East, 243, note c.

Peters v. Anderson, 5 Taunt. 596.

Mayfield v. Wadsley, 3 B. & C. 357.

II.—RIGHT OF THE CREDITOR—

To appropriate a general payment.

Manning v. Western, 2 Vern. 607.
Hall v. Wood, 14 East, 243, note c.
Peters v. Anderson, 5 Taunt. 596.
Campbell v. Hodgson, Gow, 74.
Morgan v. Jones, 1 Bro. Parl. Ca. 32.

To appropriate at any time he likes.

Peters v. Anderson, 5 Taunt. 596.
Phillpotts v. Jones, 2 A. & E. 41.
Mills v. Fowkes, 5 Bing. N. C. 455.

To change his mind as often he likes, until the appropriation is communicated to the debtor.

Simson v. Ingham, 2 B. & C. 65.
Grigg v. Cocks, 4 Sim. 438.
 [And see *Ex parte Johnson*, 3 De G. Mc. & G. 218.]

And to appropriate to any debt he pleases, e. g.

1. To a debt, payment of which cannot be actively enforced, because of—

The Statutes of Limitations.

Mills v. Fowkes, 5 Bing. N. C. 455.
Williams v. Griffiths, 5 M. & W. 300.
Nash v. Hodgson, Kay 650.

The Stamp Act.

Biggs v. Dwight, 1 Man. & Ry. 308.

The Tippling Act.

Philpotts v. Jones, 2 A. & E. 41.
Crookshanks v. Rose, 5 C. & P. 19.

2. To a simple contract rather than to a specialty debt.

Peters v. Anderson, 5 Taunt. 596.
Chitty v. Naish, 2 Dowl. 511.
Chase v. Cox, Freem. 261.
Brazier v. Bryant, 2 Dowl. 477.
 [But see *Vin. Ab. Paym. M. 9.*]

3. To a new rather than an old debt.

Peters v. Anderson, 5 Taunt. 596.
Chitty v. Naish, 2 Dowl. 511.
 [But see *Wentworth v. Manning*, 2 Eq. Ab. 261.]

4. To a debt not guaranteed, rather than to one which is.

Ex parte Whitworth, 2 Mont. Deac. & De G. 164.

Kirby v. Duke of Marlborough, 2 M. & S. 18.

Plomer v. Long, 1 Stark, N. P. 155.

5. To a debt not bearing interest, rather than to one which does.

Chase v. Cox, Freem. 261.

Manning v. Western, 2 Vern. 606.

[Heyward v. Lomax, 1 Vern. 23, *contra*.]

Provided it be a debt of which the law can take notice.

Ex parte Randleson, 2 Deac. & Ch. 534.

Wright v. Laing, 3 B. & C. 165.

Lampbell v. Billaricay Union, 3 Ex. 283.

[As to Equitable debts, see

Birch v. Tebbutt, 2 Stark. N. P. 74.

Goddart v. Hodges, 1 Cr. & M. 33.]

And be existing at the time the payment is made.

Hammersley v. Knowlys, 2 Esp. 666.

And be also then ascertained in amount.

Goddart v. Hodges, 1 Cr. & M. 33.

And provided the debtor had an opportunity of appropriating.

Waller v. Lacy, 2 Man. & Gr. 54.

Brett v. Marsh, 1 Vern. 468.

Young v. English, 7 Beav. 10.

III.—CASES WHERE NO APPROPRIATION HAVING BEEN EXPRESSLY MADE BY THE DEBTOR, AN APPROPRIATION BY HIM IS INFERRED, UNTIL SOME REASON APPEARS TO THE CONTRARY.

Inferences drawn from the nature of the debts; viz. of appropriation to—

1. Debt on which the debtor could be made bankrupt.

Meggot v. Wilson, 1 Ld. Raym. 286.

Dawe v. Holdsworth, Peake, N. P. 64.

2. Arrears of interest.

Vin. Ab. Paym. M. 4.

Haynes v. Harrison, 1 Ch. Ca. 105.

Chase v. Box, Freem. 261.

Bostock v. Bostock, 8 Mod. 242.

O'Bierne v. McMahon, 1 Jones (Jr. Eq.) 442.

Bower v. Marris, Cr. & Ph. 351.

3. Existing debt.

Hammersley v. Knowlcs, 2 Esp. 666.

4. Debt owing by the debtor in his own private capacity.

Goddart v. Cox, 2 Str. 1194.

5. Earliest item of current account.

Clayton's ca. 1 Mer. 585.

Bodenham v. Purchas, 2 B. & A. 39.

Simson v. Cooke, 1 Bing. 452.

Williams v. Rawlinson, 3 Bing. 71.

Field v. Carr, 5 Bing. 13.

Brooke v. Enderby, 2 Brod. & Bing. 70.

Pemberton v. Oakes, 4 Russ. 154; and compare Jones v.

Maund, 3 Y. & C. Ex. 154.

Copland v. Toulmin, 7 Cl. & Fin. 349.

Bank of Scotland v. Christie, 8 Cl. & Fin. 227, 228.

Smith v. Wigler, 3 Moo. & Sc. 175.

Manning v. Westerne, 2 Vern. 606.

Ex parte Randleson, 2 Deac. & Ch. 534.

Sternedale v. Hankinson, 1 Sim. 393.

Pennell v. Deffell, 3 De G. Mc. & G. 372.

Inferences drawn from the mode of payment or circumstances attending it; viz. from—

1. A payment *pro rata* of so much in the pound.

Bardwell v. Lydall, 7 Bing. 489.

Martin v. Brecknell, 2 M. & S. 39.

Raikes v. Todd, 8 A. & E. 846.

Paley v. Field, 12 Ves. 435.

Bower v. Marria, Cr. & Ph. 351 [as to interest].

2. Pressure.

Shaw v. Picton, 4 B & C. 715.

3. Substitution for security (see, too, below, No. 7).

Newmarsh v. Clay, 14 East, 239.

4. Account stated.

Perris v. Roberts, 2 Vern. 34.

5. Amount of payment and discount.

Marryatts v. White, 2 Stark. N. P. 101.

6. Form of receipt.

Bowes v. Lucas, Andr. 55.

Frazer v. Birch, 3 Knapp, 380.

7. Source of money.

Brett *v.* Marsh, 1 Vern. 468.
 Thompson *v.* Brown, Moo. & M. 40.
 Stoveld *v.* Eade, 4 Bing. 154.
 Young *v.* English, 7 Beav. 10.
 Greenwood *v.* Taylor, 14 Sim. 505.

8. Course of business.

Brown *v.* Anderson, 2 Moo. Priv. Counc. 245.
 Taylor *v.* Kymer, 3 B. & Ad. 320.
 Lysaght *v.* Walker, 5 Bli. N. S. 1.

N. L.

 ART. III.—THE MAY EXAMINATION PAPERS.

THE following questions in Common Law, Equity, the Law of Real Property, Jurisprudence and the Civil Law, Constitutional Law and Legal History, were submitted to the students of the Inns of Court at the Public Examination¹ for the Studentship, Honours, and the degree of Barrister-at-Law, held at Lincoln's Inn on the 18th, 19th, and 21st days of May, 1855. The questions are here presented, and will from time to time be so presented, for the convenience of students generally (whichever branch of the profession they may ultimately design to enter), and because we think that a careful and repeated study of these or the like questions—which, be it remembered, are sanctioned by and issued under the superintendence of the Council of Legal Education—may be made ancillary in no slight measure to the study of the law.

For the information of those who may not be conversant with the existing system of legal education, we may observe, that as an inducement to students to propose themselves for examination, studentships have, within the last few years, been

¹ No student is eligible to be called to the Bar who shall not either have attended during one whole year the Lectures of two of the Readers, or *have satisfactorily passed a public examination.*

founded by the Inns of Court conjointly, of fifty guineas per annum each, to continue for a period of three years, one such studentship being conferred on the most distinguished student at each public examination. The examiners appointed for that purpose are, moreover, required to select and certify the names of three other students who shall have passed the next best examinations;¹ and the Inns of Court to which such students belong may, if desired, dispense with any terms not exceeding two, that may remain to be kept by such students previously to their being called to the Bar. The examiners, however, do not deem it obligatory on them to confer or grant any studentship or certificate, unless they shall be of opinion that the examination of the students, whom they select as most deserving, has been such as entitles them thereto.

It is further provided, that a student may present himself at any number of examinations, until he shall have obtained a certificate; that any student who shall obtain a certificate may present himself a second time for examination as a candidate for the studentship, but only at one of the three examinations immediately succeeding that at which he shall have obtained such certificate; provided, that if any student so presenting himself shall not succeed in obtaining the studentship, his name shall not appear in the list; and also that students who have kept more than eleven terms shall not be admitted to an examination for the studentship.

As regards the mode of conducting the examination, the course adopted is this:—Each student is required to answer in writing certain *printed* questions, and is examined *orally*, apart from the other students; and the character of his examination varies according as he is a candidate for honours or a studentship, or desires simply to obtain a certificate; both the oral examination and printed questions are founded on books indicated to the student beforehand; but regard is had to the particular object with a view to which he presents himself for examination. And in determining the question whether a stu-

¹ At every call to the Bar, those students who have passed a Public Examination, and either obtained a Studentship or a Certificate of Honour, take rank in seniority over all other students who are called on the same day.

dent has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners principally have regard to the *general knowledge of Law and Jurisprudence which he has displayed.*

At the last May Examination, the subjects selected and questions proposed thereupon were respectively as under :—

In Common Law, candidates for a certificate, entitling to be called to the degree of Barrister-at-Law, were examined in—

1. The Ordinary Steps and Proceedings in an Action at Law as regulated by the Statutes 15 & 16 Vict. c. 76, and 17 & 18 Vict. c. 125. (This subject to be read from Smith's Elementary View of an Action at Law, 5th edition.)

2. The Nature and Classification of Contracts. (Smith's Lectures on the Law of Contracts, lect. 1.)

3. The Elements of our Criminal Law in relation to the following offences :—Burglary, Simple Larceny at Common Law, and Embezzlement. (Archbold's Criminal Pl., 12th edition, book 2, part 1, under the above titles.)

Candidates for the studentship, or for honours, were examined in the 1st and 3rd of the foregoing subjects, and also in—

4. The Law of Principal and Agent, and of Partners (Smith Merc. L., 5th edition, book 1, chapters 2 and 5) ; and in connection with the Law of Partners, *Waugh v. Carver*, 1 Smith Lead. Cas. p. 491, and *Buckley v. Barber*, 6 Exch. R. 164, were specified for perusal.

5. The Rights and Obligations of Carriers of Goods and Passengers. (Story on Bailments, 5th edition, chap. 6, arts. 8 & 9.)

Upon the foregoing subjects, the following Questions were proposed :—

1. What is meant by an Estoppel, a Merger, a Consideration for a Promise ?

2. State the formalities attending the execution of a Deed ; and specify the peculiar properties attaching to that instrument.

3. In what respects does a Simple Contract differ from a Contract of Record ?

4. Mention any exceptions which present themselves to the rule *Ex nudo pacto non oritur actio*.

5. Explain the mode of proceeding civilly against a foreigner resident out of the jurisdiction of our Courts.

6. Who is an Executor *de son tort*? And when may his act be good as against the true representative of the deceased?

7. In what cases may there be a remedy at law by a partner against his co-partner?

8. What are the ordinary remedies by action upon a deed?

9. What is meant by "concurrent" Writs of Summons? When may they expediently be issued?

10. How may the Writ of Summons be renewed? And what is the object proposed to be effected in renewing it?

11. Who is to be deemed a common Carrier? What is meant by saying that he is at Common Law an insurer?

12. Is a common Carrier bound at law to carry goods for any applicant? Under what special circumstances will he be excused from taking charge of them?

13. What point as to the *jus disponendi* was decided in *Buckley v. Barber*, 6 Exch. R. 164?

14. What course should be adopted by a Plaintiff in case of the Defendant's non-appearance — (1st) where the Writ of Summons is specially indorsed; (2nd) where it is not so indorsed?

15. *In contractis tacite insunt quæ sunt moris et consuetudinis*. Mention instances showing the meaning and application of this maxim.

16. What are the material words charging the offence in an indictment for Larceny?

17. In what does a taking differ from an asportation in the definition of Larceny? Mention cases which may be calculated to throw light upon the meaning of the expression "*anime furandi*" which occurs therein.

18. Enumerate some things which are not subjects of Larceny at Common Law.

19. What were the facts, and what was the decision upon

them, in *Reg. v. Thurborn*, 1 Den. C. C. 387 ; in *Reg. v. Preston*, 2 Den. C. C. 353 ; and in *Merry v. Green*, 7 M. & W. 623 ?

20. An agent is not in general authorized, even in cases of necessity, to borrow money upon the credit of his Principal. Mention certain special exceptions to this rule, and state the reasons on which they rest.

21. Mention cases in which one labouring under an incapacity to contract as Principal may nevertheless contract as Agent for another.

22. State the facts in *Cornfoot v. Fowke*, 6 M. & W. 358 ; and give a sketch of the reasoning, *pro* and *con.*, with reference to them.

23. In what cases respectively may the Writs of Mandamus and of Injunction be claimed at Common Law ?

24. Wherein does the statutory offence of Embezzlement consist ?

In Equity the subjects for examination were :—

1. Smith's Manual of Equity Jurisprudence. The Act for the Improvement of Equity Jurisdiction, 15 & 16 Vict. c. 86.

2. White and Tudor's Leading Cases (with the Notes), vol. i., particularly as regards the subjects of Voluntary Settlements, and the Rights of Married Women recognized in a Court of Equity only.

Candidates for certificates having been examined in the first of the above classes, and candidates for the studentship or honours in all the books and subjects just mentioned.

Upon these subjects the questions proposed were as follow :—

1. Explain the term "Traversing Note." Is it in any and what case proper to file a traversing note under the present system of procedure ?

2. A testator dies, leaving real, but no personal, estate : in what manner shall the realty be applied in payment of debts—1st, in case it is charged by the will with such payment ;—2nd, in case it is not so charged ?

3. For what reason, when a mortgage is made to two or more mortgagees, is it usual to insert in the mortgage-deed a proviso that the receipt of the survivors or survivor for the mortgage-money shall be a good discharge to the mortgagor? State the general principle upon which the reason depends.

4. At what period does the Crown appear to have acquired the right of administering the estates of idiots and lunatics? In what manner is the Jurisdiction in Lunacy conferred, and by whom now exercised?

5. State the general rule respecting priority in payment between partnership and separate debts out of partnership and separate property.

6. A testator bequeaths by his will a sum of money "for such charitable purposes as he shall by codicil direct," and dies without making a codicil. How shall the money be disposed of?

7. *Cestui que* trust of real estate dies intestate and without an heir. To whom does the beneficial interest in the property belong? Give reasons and quote authority for your opinion.

8. A testator, being indebted to his child, bequeaths to him a share of residuary personal estate greater in value than the amount of the debt. Shall the legacy be considered a satisfaction of the debt? What are the grounds of your opinion?

9. The personal estate of a testator is exhausted in payment of his simple-contract debts, which amount to 300*l.*; he has bequeathed two legacies, of 800*l.* and 400*l.* respectively, but not charged them upon his real estate. Have the legatees any and what claims upon the real estate, which is of ample value?

10. Mention the leading rules which have been laid down for the interpretation of precatory words in a testamentary instrument.

11. A mortgagee in fee, with power of sale, sells part of the mortgaged estate during the life of the mortgagor, and the remainder after his decease. It is provided by the mortgage-deed, that the surplus monies to arise from the sale, in case a sale should take place, are to be paid to the mortgagor, his executors or administrators. To whom should the mortgagee pay the surplus—1st, in case the produce of the first sale was more

than sufficient to satisfy the mortgage; next, in case the second sale was also necessary?

12. Explain the distinctions between the modes of effecting a partition at Common Law, in Equity, and by the Inclosure Commissioners.

13. What jurisdiction is exercised by Courts of Equity over the publication of private letters; and upon what right does the jurisdiction proceed?

14. State generally under what circumstances specific performance will be decreed, although the Plaintiff is unable to fulfil all the terms of his contract.

15. Two legacies of equal amount are bequeathed by a testator to the same person, in different testamentary instruments. In what cases shall the legacies be considered cumulative, in what substitutional?

16. Under what circumstances will a debt, which at law is joint, be considered in Equity as several also?

17. Land is devised to a feme covert and her heirs, for her separate use. Can she dispose of the equitable fee by deed or will during the lifetime of her husband? Quote authorities for your opinion.

18. Out of what property is a wife entitled to a settlement in Equity? Can she successfully insist on a settlement out of property vested in trustees upon trust for herself for life, in any and what cases?

19. A conveys an estate to B, in consideration, as is alleged in the purchase-deed, of B entering into the covenant therein contained for payment of an annuity to A. The annuity falls in arrear. Has A any remedy except that upon the covenant? State the grounds of your opinion.

20. Property held under a lease for years from a corporation is bequeathed to A for life, with a bequest over to B, his executors or administrators. A, during the term, obtains a renewal of the lease to himself, his executors or administrators, and dies during the renewed term, having bequeathed all his interest therein to C, his executors and administrators. C enters on the premises, and purchases the reversion from the corporation before the renewed term expires. What are the rights of B

during and after the expiration of the period for which the renewed term was granted? Give reasons and quote authorities for your opinion.

In Real Property the subjects for examination were :—

1. Williams on Real Property; Stephen's Commentaries, vol. i.; Sugden on Powers, vol. i.
2. The Statute of Limitations (3 & 4 Wm. 4, c. 27).
3. The Statute of Wills (1 Vict. c. 26, secs. 24—33).
4. Sales of Real Estate by Trustees or Executors in pursuance of a trust or a power; and the Liability of Purchasers to see to the application of their purchase-money; Sugden on Powers, vol. i. p. 129; vol. ii. p. 464. *Stroughill v. Anstey*, 1 De G. M. & G. 635.

Candidates for honours were examined in all the foregoing books and subjects. Candidates for a certificate in those mentioned in part I only.

Upon the books and subjects above specified, as bearing upon the Law of Real Property, were proposed the following questions :—

1. Distinguish between estates held in joint tenancy, tenancy in common, and coparcenary. A seised in fee dies intestate, leaving two daughters, B and C. B conveys all her estate in the lands to D in fee. What is the quality of B's estate before and after the conveyance?

2. A is tenant for life, with remainder to B in tail. How can B at the present day acquire an estate in fee-simple in remainder? Explain the mode of proceeding adopted for a similar purpose previous to the 3 & 4 Wm. 4, c. 74.

3. What is the origin of conveyance by lease and release? Mention the alterations that have taken place since the passing of the Statute of Uses.

4. Explain and illustrate the difference between a conditional limitation and a contingent remainder.

5. Distinguish between conditions precedent and subsequent; and illustrate the effect of the non-performance of either kind of condition upon the estate to which it is annexed.

6. Explain the difference between a remainder and a reversion; and state the reasons why a vested remainder can, and a contingent remainder cannot, be supported by a chattel interest in land.

7. Distinguish between powers appendant and in gross. To what extent are powers appendant to an estate for life affected by the alienation of the estate?

8. An estate is conveyed to A and his heirs to such uses as B shall appoint. In whom does the common law seisin reside until appointment? and, if B appoints to C to the use of D, who takes the legal estate?

9. Explain the difference between general and particular powers of appointment. By marriage settlement an estate is limited to such uses as A shall appoint in favour of his children or more remote issue. An appointment is made in favour of A's son for life, with remainder to the children of A's son in equal shares. Is the appointment valid to its full extent? If not, how would you modify it so as to make it good?

10. Define an executory devise; and discuss the validity of the following testamentary gift:—To A and his heirs, and if B die without issue, to the children of C on the youngest child attaining the age of twenty-four years.

11. "The real estate of a deceased owner is now liable to all his debts of every description." Trace the development of the Law upon this subject.

12. A testator directs all his real estate to be sold, and the produce to be applied in the payment of debts and legacies. In whom is the authority to sell vested? and will the exercise of the authority confer a good title on a purchaser as against the testator's heir?

13. By the 1 Vict. c. 26, a will operates so as to pass real estate, whether acquired before or after execution. What was the old rule upon this subject, and upon what principles was it founded?

14. Husband and wife, seised in fee in right of the wife, convey to a purchaser. Explain the nature of the conveyance, and the solemnities requisite to be observed, so as to give the purchaser a good title.

15. A testator (by will dated subsequent to the passing of the 1 Vict. c. 26) devises land to A (a stranger) in tail, with remainders over. A dies in the testator's lifetime leaving issue. What effect has the 32nd section in this case?

16. Is a trust for a charitable purpose liable to be barred by the Statute of Limitations (3 & 4 Wm. 4, c. 27)? Lands are devised to A in fee, charged with an annuity of 10% for the use of the poor of X. The annuity remains unpaid, and no claim is made on behalf of the charity for twenty years after the testator's decease. Is the estate in the hands of A discharged from the annuity?

17. What is the use of covenants for title in a conveyance of real estate? and how are they made to run with the land, as, for instance, in a conveyance to uses to bar dower in favour of a purchaser?

18. When trustees sell under a trust or a power, and a power to give receipts is also inserted in the instrument, a purchaser is exempted from seeing to the application of his purchase-money. Explain the equitable principles upon which this rule is founded; and mention some of the instances in which such a power, if not *expressly* given, will be *implied*.

19. Explain the nature of the protection afforded by means of an outstanding term, when assigned to a trustee for a purchaser at the time of the purchase; and the effect of the 8 & 9 Vict. c. 112, upon this subject.

20. An estate is devised to trustees for a term of years, upon trust to sell, and out of the produce of the sale to raise a sum of money; subject thereto, the estate is devised to A and his issue in strict settlement. Are the trustees justified in raising the sum required by mortgage?

In Jurisprudence and the Civil Law, candidates for honours were examined in the following subjects:—

1. The First Two Books of the Commentaries of Gaius.
2. The Last Two Titles of the Fiftieth Book of the Digest, "De Verborum Significatione" and "De Regulis Juris."
3. The Sixth, Seventh, and Eighth Lectures of Kent on International Law.

4. The Tenth, Eleventh, and Twelfth Chapters of the Second Book of Grotius, "De Jure Pacis et Belli."

Candidates for a certificate were examined in—

(1.) The First Two Books of the Institutes of Justinian, with the Notes contained in Sandars's edition.

(2.) The Seventh and Eighth Lectures of Kent on International Law.

The questions upon the above-mentioned books being as under :—

1. State briefly the rules which Grotius has propounded for determining the obligations of a *bond-fide* possessor in reference to mesne profits. What difference is there on the subject of mesne profits between the English and Roman Law? What are the observations of Mr. Hallam on this conflict of the two systems?

2. To what principle does Grotius propose to resort for the purpose of solving questions as to the obligatory force of agreements entered into under mistake?

3. What rules concerning the distribution of Profit and Loss among sharers in a joint undertaking does Grotius consider to be deducible from the nature of the contract?

4. What is the true distinction between the Law of Persons and the Law of Things? What is the relation of the Law of Actions to the other departments of Law?

5. In what respects did the legal position of an enfranchised slave differ from the *status* of a free-born citizen: (1) under the Roman Law, as remodelled by Justinian; (2) under the *Leges Junia* and *Ælia Sentia*?

6. Define Agnatic Relationship, and explain the principle on which it depends.

7. From what period of a man's existence do his civil rights date in Roman Law? Do his civil duties date from the same period? Can an unborn child, in Roman Law, communicate rights to any other person?

8. What is the true *rationale* of the distinction between *Res Mancipi* and *Res nec Mancipi*? Illustrate your answer by reference to the history of English Law.

9. Define Simple Possession and Civil Possession. In what manner does Roman Law allow Possession to be gained and lost?

10. What were the principal changes effected by Justinian in the Law of Usucapion and Prescription? What was the original distinction between "*Usucapio*" and "*Præscriptio longi temporis*"?

11. What conditions must be satisfied under Roman Law in order that a title to property may be gained by Prescription? How did the English words "*Usurp*" and "*Usurper*" acquire their meaning?

12. What is the general doctrine of Roman Law as to the acquisition of property in *Res inexhausti Usûs*? Did the Roman Law permit rights of property to be acquired in the sea-shore?

13. Define a *Universitas Juris*, a Universal Succession, a "*Hæreditas*," a Will, a Legacy, and a *Fidei-commissum*.

14. What formalities did the Roman Law require to be observed in *signing* a Will, in *witnessing* it, and in *opening* it?

15. State briefly the conditions which must be satisfied in order that a *blockade* may be so completely established as to affect the rights of neutrals. If the blockading squadron be temporarily absent, will the blockade be necessarily suspended?

16. Enumerate the acts of assistance afforded by a neutral ship to a belligerent which International Law condemns as illegal.

17. What exceptions are there to the rule, that the power competent to bind a nation by treaty is also competent to alienate the public domain by treaty.

18. Explain and illustrate the following rules and propositions:—

- (a) Verbum "*oportere*" non ad facultatem judicis pertinet, qui potest vel pluris vel minoris condemnare, sed ad veritatem refertur.
- (b) Semper in obscuris quod minimum est sequimur.
- (c) Quoties æquitatem desiderii naturalis ratio aut dubitatio juris moratur, justis decretis res temperanda est.

- (d) Quod contra rationem juris receptum est, non est producendum ad consequentia.
- (e) Non ut ex pluribus causis deberi nobis idem potest, ita ex pluribus causis idem potest nostrum esse.
- (f) Imperitia culpæ adnumeratur.

In Constitutional Law and Legal History, candidates for honours were expected to have mastered the chapters 1, 2, 7, 8, and 15, of Hallam's Constitutional History; the chapter in Foster's Crown Law relating to the Law of Treason; and the chapter on the same subject in Mr. Stephen's edition of Blackstone's Commentaries; the chapters in Rapin's History of England containing the reign of Charles I., and those in Tindal's Continuation of Rapin, or Belsham's History, containing the reign of William III.; and the first volume of Clarendon's History of the Rebellion.

They were also expected to be acquainted with the remarkable State Trials in the reigns of Charles II. and William III.

Candidates for a certificate were expected to be able to answer any question bearing upon the leading events of English history, and to be well acquainted with chapters 1, 8, and 13, of Hallam's Constitutional History, and the chapters in Rapin containing the History of Charles I.

Upon the above subjects the following questions were founded :—

1. State the instances in which, during the reign of James I., the House of Commons exercised the right of impeachment.
2. Give an account of the Statute of Fines in the reign of Henry VII.
3. What provision was made for the security of the subject in the reign of Henry VII.?
4. Give an account of the Statute of Uses, the causes which led to it, and the effect on the transfer of property which it produced.
5. State the encroachments on the liberties of the subject in the reign of Henry VIII.
6. What was the character of Henry VIII.'s Parliaments, and in what instances did they betray the trust reposed in them

7. State any instance in which Henry VIII. gave way to the demands of the people.

8. Did the House of Commons recover any portion of its influence in the reigns of Edward VI. and Mary? and state the reasons for your opinion.

9. Mention any remarkable Crown prosecution which was defeated in the reign of Mary.

10. Mention any remarkable attainders in the reign of Edward VI., and give some account of them.

11. Give an account of the Parliament of 1628, and of the principal measure to which it obtained the assent, with an account of the manner in which that assent was given.

12. What was Pine's case?

13. State the grounds on which the proceedings in Lord Russell's trial may be questioned.

14. State the grounds on which the proceedings in Algernon Sydney's trial may be questioned.

15. Give an account of the proceedings in Sir John Fenwick's case.

16. State the chief provisions and the date of the Act of Settlement.

Besides the foregoing papers on the leading branches of Law, History, and Jurisprudence, there is laid before the students, by way of *finale* to the examination, and with a view to testing their knowledge yet more strictly by a few questions, in each department, of special difficulty and importance, a General Paper, which in its nature may be regarded as akin to the Problem Papers set in the Senate House at Cambridge, or to those framed at the sister university for exercising the scholastic qualifications of her *alumni*.

At the last May Examination the General Paper comprised the following questions:—

1. Give an account of the changes of the Constitution from the abdication of James II. to the accession of Queen Anne.

2. Give an account of the Parliamentary inquiries which took place in the reign of William III.

3. State the causes which led to the Revolution of 1688.

4. A testator, domiciled in England, by will made before the 1st of January, 1838, attested by only two witnesses, and not valid according to the Law of Scotland as a disposition of heritable property situate in that country, bequeaths part of his personal property to one who is his heir according to the law of both countries. Will the heir entering on the Scotch or English estate, be allowed to receive the legacy also? Give reasons for your opinion, and quote authorities.

5. A father, by deed, purports to assign, in consideration of natural love and affection, stock invested in his name, and also other stock standing in the names of trustees to which he is absolutely entitled, to his son. The deed is handed over to the son, but no notice of its existence is given to the trustees. The father dies, having by will bequeathed all his money in the funds to his wife. Is the wife or the son entitled to the sums of stock? State the ground of your opinion, and refer to authorities.

6. A creditor does not make to a surety, on his entering into the suretyship, a full disclosure of all circumstances calculated to influence the conduct of the surety with regard to entering into the contract. Is the contract void as a general rule? Refer to decisions on the subject.

7. A testator seised in fee of Whiteacre, subject to a mortgage of 1,000*l.*, and also of other real estate, devises Whiteacre to A, in fee, freed from the mortgage debt. The residue of his real estate he devises to B, in fee, charged with the payment of the 1,000*l.* and of his debts and legacies. Is a purchaser from C bound to see to the application of his purchase-money in satisfaction of the mortgage debt?

8. A, in 1840, mortgages to B in fee, and enters into the usual covenant for payment of principal and interest. No payment of interest or acknowledgment thereof having been made by A, B, in 1850, files his bill for payment of principal and interest, and, in default, for foreclosure. Is B entitled to the whole amount of interest due, or only to six years' arrears?

9. An estate is devised to A and B, and their heirs, upon certain trusts, in favour of C and his children. The will also

empowers "A and B, or the survivor, or the heirs of such survivor," to sell the property, and provides that the receipts "of A and B, or the survivor, or the heirs, executors, or administrators of such survivor," shall discharge the purchaser. B, the surviving trustee, devises the estates upon the original trusts. Can B's devisee effectually exercise the power of sale?

10. What exceptions are there to the rule of international law that the obligations of treaties are permanently extinguished by the breaking out of hostilities between the high contracting parties?

11. Describe briefly the erroneous views on the subject of possession which Savigny refuted in his Treatise. Explain also, very briefly, the nature of the theory which he substituted for them.

12. What are the chief analogies, and the principal points of difference, between the ownership *in bonis* of the older Roman Law and the equitable ownership of our own system?

13. *In jure non remota causa sed proxima spectatur*. Explain generally the meaning of this maxim in reference to the Law of Insurance.

14. A promises B to undertake for him gratuitously the performance of certain duties: before the time arrives for commencing to perform them, A withdraws from his engagement, in consequence whereof B sustains damage. Will A, under these circumstances, be liable to B at law?

15. A *bonâ fide* hires a horse for a particular purpose, and, when that purpose has been accomplished, wrongfully sells the horse and receives the proceeds of the sale. Is A indictable for larceny? Explain fully the grounds of your answer.

To those who might, without perhaps having duly informed themselves as to the working of the present system of legal education, be inclined to doubt or to gainsay its salutary tendencies, we would confidently suggest that an examination so searching as that of which the elements have been in part¹ only

¹ It will be borne in mind, that besides the *written* there is (as already intimated, *ante*, p. 51) an *oral* examination, comprehensive in its range, and searching in its character, to which each student, whether for a certificate or for honours, is required to submit himself.

here presented, must indubitably prove beneficial ; must materially facilitate the student's onward progress in the right path, and conduce to accuracy in his knowledge of law and legal principles.

ART. IV.—LORD BROUGHAM AND VAUX: HIS PROFESSIONAL AND PARLIAMENTARY CAREER.

WITH A SKETCH OF HIS POLITICAL AND LITERARY CHARACTER.

(*Concluded from Vol. LIII. No. CVII. p. 341.*)

HAVING throughout the preceding pages of this biographical sketch pointed with accuracy and minuteness to the various authorities upon which our statements of facts or expression of opinions rested, we might now, without incurring suspicion of indulging in vague conjecture or drawing rash conclusions, proceed at once to convey to the reader some idea of the impressions which have been produced upon our own mind by the contemplation of Lord Brougham's career ; but it cannot fail, we conceive, to be more satisfactory that we should, before closing our narrative, allude to such passages of his public life, in connection with the history of parties, as may enable us to form an impartial and enlightened estimate of his political and literary character. These subsidiary hints, however, that we may avoid endless repetitions and uninteresting details, must be very brief and very general.

As the courts in which ecclesiastical law is dispensed had been put by Lord Brougham through a process of severe purification, so the anomalies and extravagancies of the Church itself underwent strict though cautious revision by him. Aware that the more refined and elevated feelings of men can be awakened and kept alive only by watchful care and prudent encouragement, he entertained a strong and unchangeable opinion as to the expediency of a religious establishment,—that is, of a recognised clerical body, while he considered its structure and mode of operation as topics totally distinct from the existence of the

institution itself. Thus, although at all times jealous of legislative interference with the rights of property, he drew a strongly-marked line of distinction between the property of the Church and that of private individuals: with the former, for instance, held in trust for the attainment of certain ends, the Legislature has a right to interfere so far as to enforce the performance of duties demanded in return for emoluments received. Accordingly, he prepared two bills, with a view to the correction of two notorious abuses in the ecclesiastical establishment, viz. the non-residence of the clergy,¹ and the enjoyment of a plurality of benefices.² A true friend of the Church, he was just towards dissenters of all denominations; and to their complaints, provided these were founded in truth and expressed in respectful language, his ears were ever open. The children of the House of Israel, for example, have, since the days of Artaxerxes and Haman, been harshly branded as being "a certain malicious people that have laws contrary to all nations, and that continually disobey the commandments of kings;" but, in accordance with the principles of civil and religious liberty which Lord Brougham has always avowed, he considered such British subjects as professed the Jewish religion entitled to the enjoyment of all the rights, immunities, and privileges of the English constitution. In perfect harmony, too, with the views which he had uniformly advocated, he was equally anxious to close against the people all facilities to inebriety or any immorality, and to enlarge the sphere of their innocent recreations. In debate, political friend or foe met with strict justice at his hands. He guarded his fellow-peers against the adoption of rash legislative measures, or an indiscreet discussion of plans which were not fully matured. On knotty points even of international law he shrunk not from the responsibility of his exalted position; he was, as it were, standing counsel to the Government and interpreter-general of treaties.³ In short, the Herculean labours of Lord Brougham, so long as he occupied the woolsack, spontaneously expended upon the important interests of juridical, educational, and ecclesiastical reform, though they threatened

¹ 25th June, 1834.

² 23rd May, 1834.

³ *Vide* the discussion on the "Methuen Treaty" (21st February, 1851).

to exhaust his strength, enfeebled not his will to take an active part in deliberating upon topics connected with the domestic, colonial, and foreign policy of the kingdom.

isolation Nor was all this insipid leaven of dry legislature without its sprinkling of salt; for, although Lord Brougham professed the utmost anxiety to consult the convenience of the House of Peers, and ascribed, with great truth we believe, any apparent neglect of duty to the multifarious avocations which weighed him down, the public was still occasionally reminded that the Lord High Chancellor was afflicted with many of the ills, if not blessed with the patience, of Job. In justice to all parties, however, let it not be forgotten that the period of his official career was an epoch of uncommon political excitement; and that the members of the House of Lords were all feverish. It was on the 21st of April, 1831, that the king went in state to prorogue Parliament. The Lord Chancellor withdrew from the woolsack in order that he might meet his majesty. In the mean time, the duke of Richmond having observed that the duke of Wellington had taken his seat next to Lord Lyndhurst, insisted that noble lords should occupy their proper places; and Lord Brougham, on his return, threw himself into the thick of an encounter which originated in "alarming" reports of an intended dissolution of Parliament. Within a few weeks after the House of Lords had met, another scene, more amusing than dignified, was unfolded to the public eye. The Lord Chancellor had no sooner begun to read the Address, than he was called to order amidst a volley of cross-fire which proved almost too loud and severe for the nerves even of Lord Brougham. Some exclaimed "Read," while others vociferated "No, no." He, at that time a novice to the forms of the Upper House, was perplexed; and this is the less wonderful, since those who had been born and bred peers were far from being harmonious in their views of what did or did not constitute "order." His self-love was thus not unfrequently wounded by abrupt interruptions, and on such occasions he was insensibly betrayed into the expression of an egotism which a man endowed with his powers, accomplishments, and virtues, might have safely shunned. But he was not always successful in his attempts to justify his occasional devia-

4 tions from the line of conduct prescribed by usage and precedent; although, no doubt, exceptions were, without much reason, taken to his forgetfulness of official etiquette. Whatever license, however, might be mutually arrogated by noble lords within the walls of Parliament, a respectful neutrality was to be enforced against all external intermeddlers, particularly if these happened to be at once ignorant and malicious. Lord Brougham had been on all occasions a warm advocate for the liberty of the press, and extremely lenient to its errors. No man, if such had been his disposition, might have more frequently and reasonably complained of its insolence; and yet he was always the first to forgive its offences. His forbearance in this respect was habitual, and springing not from caprice; he preferred living down any calumny to risking the dignity of Parliament by involving it in disputes with the organs of public opinion. His eyes and ears must have been sealed if he had not been fully aware that he was about this period, and indeed at all times, a mark for the poisoned arrows of political hatred. In silence, however, was he wont to shake off the fiery darts, and never was the slightest scar left behind. But this spirit of indifference which animated him in meeting all attacks upon his personal or political conduct was very naturally and very properly converted into mingled indignation and scorn when his integrity as a judge happened to be impugned. The *Morning Post* had dared to affirm that the Lord Chancellor had on one occasion garbled² the minutes and falsified an entry of the judicial proceedings of the House of Lords. We disdain to attach even a shadow of importance to the vulgar and mendacious calumny by gravely vindicating Lord Brougham from so foul a charge. He chastised the open offender, and through him the secret traducer. His defence was, as a matter of course, triumphant; and, in an otherwise adverse assembly, he resumed his seat amidst cheers from even his political foes.

But Ireland was the rock on which the administration of Lord Melbourne was destined to be shipwrecked. Lord Brougham had fully concurred with Earl Grey in sanctioning certain remedial measures which appeared essential to the tranquillity of the

² In the cause of *Solarte v. Palmer*, *vide* H. P. D. 3rd series, vol. xxiv. pp. 892, *sqq.*; and *Annual Register*, vol. lxxvi. pp. 318, 319.

State, and the prosperity, nay, the safety, of the Church in that part of the empire. Disease was eating into the very vitals of the establishment; and to soothe, if not to heal the sore, the Church Temporalities Bill was proposed by the minister. The views of the Chancellor were on this subject simple and distinct: excrescences were to be lopped off that defects might be supplied: any unappropriated surplus of revenue ought, he maintained, to be, above every other consideration, made available for enlarged efficiency within the circle of operation which the establishment itself embraced; and he conceived it to be perfectly consistent with strict adherence to this principle, that the cause of education according to the principles of the Church should not be forgotten. But Ireland, on the one hand, refused to be thus conciliated, and Lord Brougham, on the other, while anxious to extend to her all the privileges of the British constitution, firmly opposed any measure the tendency of which was not merely to endanger the stability of the monarchy but to menace the very existence of the United Kingdom. He scorned the idea of dissolving the union between England and Ireland, and exposed the baseness of those agitators who, instead of pursuing the path of honourable ambition, courted notoriety by inflaming the passions of the ignorant, and stooped to pick up a subsistence by personal and political mendicancy. In short, the language and acts of the Irish people had risen to so outrageous a height, that when, at the beginning of the year 1838, Earl Grey intimated his intention to submit for the consideration of the Legislature a bill, the object of which should be the effectual repression of disturbances in Ireland, the Chancellor, while he regretted that any necessity for the adoption of severe and stringent measures should exist, forgot not that, duties between the subject and the Government being reciprocal, protection afforded to life, liberty, and property, is the only ground upon which a State can claim obedience to the law, or the Crown assert its right to a due allegiance. He admitted that the Act, which he hoped might be soon rescinded, involved a suspension of the Constitution, and a temporary infraction of the rights of the Irish people; and being such, he would not exempt from its operation parties who might organize resistance

to the laws: he would not "press with the whole weight of his loins upon the ignorant peasant," and, "at the same time raise not his little finger" against selfish and crafty men, who, day after day and year after year, were striving to construct out of the elements of local and partial discontent one universal system of political agitation. Negotiation upon this point between the Government in London, the Lord-lieutenant in Dublin, and Mr. Littleton, then Secretary for Ireland, led to mutual misapprehension and ministerial confusion. Distrust and dissensions crept even into the secret places of the cabinet: disclosures of confidential communications were demanded, and, the documents being withheld, the ministers of the Crown exposed themselves to suspicion and severe reprimand. The Government had been already weakened by the secession of some of its members and by the apathy or aversion of others who still reluctantly adhered to it. Earl Grey, too, bending under the weight of three score years and ten, as well as the burden of public affairs, was anxious to retire from public life; and we cannot help even now feeling regret that the close of so protracted and brilliant a career should have been hastened by causes extraneous to himself. That Lord Brougham was a party to any cabal which had for its object the quiet expulsion of Earl Grey from office we do not believe; and we allude to the subject chiefly because it afforded to Lord Brougham an opportunity of passing a high and well-merited eulogy on the character of the retired minister, towards whom he had uniformly displayed the most unfeigned respect and esteem. But the Chancellor might probably have more successfully consulted his personal and political reputation by withdrawing along with his acknowledged chief than by consenting to serve under Lord Melbourne, whose bland and hollow courtesy could not commend itself to the masculine and virgulous, though somewhat rugged mind of Lord Brougham. He ought to have spurned connection with a minister who, notwithstanding all his fascinations, was possessed of neither moral weight nor intellectual power. The result of various negotiations was, that, instead of a premier being selected to construct a Cabinet, those members who had not resigned, and who constituted the body of a ministry, simply looked out for a new

head. The lot fell to the Home Secretary, Lord Melbourne; Lord Brougham continuing to hold the Great Seal. The first act of the re-modelled ministry was ominous of its speedy downfall; for it was inaugurated by one of those anomalous movements which occasionally occur in public life, when the recognition of a new political opinion, or the renunciation of an old one, happens opportunely to be coincident with the retention of office and the enjoyment of power. The minister announced to the House of Lords that the Irish Coercion Bill, as sanctioned by Earl Grey and the Chancellor, had been thrown aside, and was to be replaced by another measure from which the objectionable clauses were to be excluded. This change of ministerial action appeared, to simple minds uninitiated in the mysteries of party, to be a very audacious stroke of policy. Certain members of the cabinet, and in the very front of them Lord Brougham, threw themselves open to a charge of gross inconsistency; and the only explanation offered by him was founded on the assumption that the measure, as originally framed, could not be carried through the House of Commons. His vindication amounted to neither more nor less than that the Government had no option in the matter; and he went so far as to affirm, that if Earl Grey had continued at the head of affairs, he certainly would have, under the altered circumstances of the case,¹ adopted the course which Viscount Melbourne had been compelled to pursue. He, at the same time, positively denied that any bargain had been struck, or even contemplated, between the Government and the party of which Mr. O'Connell was the acknowledged representative; and avowed that not the contents of the letter written to Earl Grey by the Lord-lieutenant, but the *discovery* of those contents, was the reason for omitting the clause relating to public meetings—a lame

St. Louis
¹ The expression of Earl Grey was, that he would have "advised it;" and Lord Brougham inferred that "what Earl Grey would have advised he would have done." That, however, was only a moral, not a logical conclusion. Fearless though he was, Earl Grey shrunk from the discredit which could not but attach to inconsistency so gross. The difficulty of his position was, in all likelihood, his chief motive for retirement at that critical juncture from public affairs; although it must be admitted that he had, in the course of the preceding year, expressed a wish to resign office.

apology, no doubt, for so flagrant a departure from political principle; because, as the Duke of Wellington remarked, a reformed House of Commons surely never could have so far stultified itself as to reject the bill originally proposed, simply because the public had *discovered* that a certain correspondence had taken place between the Prime-minister and the Lord-lieutenant.¹ These communications, however, between England and Ireland, were in their effects, though not literally in their agency, electrical. The weakness and vacillation of the ministry could not be concealed: from the moment of Earl Grey's resignation, want of united action and intrinsic power had rendered it dependent for its existence upon the support of extreme factions: shock succeeded shock, and the entire frame of the Cabinet quivered under the malign influence, until it gradually expired.

On the 16th of August, 1834, Parliament was prorogued; but the recess brought no respite to the excitement into which the Lord Chancellor had allowed himself to be thrown. During the autumn, he traversed various parts of Scotland, where by his words and acts he attracted much notice and provoked bitter

¹ We must not allow to pass unnoticed a little incident which glitters amidst these dull debates, and is illustrative of the character of Lord Brougham. He expressed a hope that the production of the correspondence between the Marquess of Wellesley (the Lord-lieutenant of Ireland) and himself would not be demanded; "for," said he, "if the letter to Earl Grey is unfit for publication, the correspondence which has passed between the noble marquess and myself is certainly not less so. It relates to private and domestic subjects, and would be perfectly unintelligible to the public at large. Some of it is in prose, and some not in prose; some in Latin, and a small part in Greek; and I believe that a more motley correspondence has never before been produced. It is this literary correspondence which I have carried on with so accomplished and great a man as Lord Wellesley, which has formed the chief amusement of my minutes of relaxation from business. But I repeat that the letter sent by Lord Wellesley to Earl Grey was not occasioned by anything written by me." The writer of this note may be permitted to add, that he would rather have a glimpse of a correspondence on points of literature and taste between two such men as the Marquess of Wellesley and Lord Brougham than of a whole mass of communications written by Irish secretaries or Irish agitators upon any political topic whatever. We should probably find Lord Brougham's compositions in Greek and Latin inferior to those of his noble and accomplished friend; but any incidental critical remarks which may have dropped from him must, we know, have borne the impress of his acute and vigorous mind. Here again we have a gleam of sunshine amidst the storm—Lord Brougham's undying love of literature cheering him during days of political darkness.

remark. A volley of paper pellets was opened upon him from the public press. The *Times*—that pillar of the Fourth Estate, which occasionally,

“ Like a tall bully lifts its head and lies,”

had, on this occasion, ample materials for vehement invective and scalding satire; and it stands recorded by the pen of a writer whose dispassionate narrative rises to the dignity of history, that “ both the substance and the language of his speeches were often such as sober reason could not approve or justify.” About the same period, a war of words was waged between Lord Brougham and the Earl of Durham. The former having, at a dinner given to Earl Grey, in the North of England, denounced “ hasty ” reform and made some allusions which were felt to be pointed at the latter, that nobleman replied in a few sentences, which met with so enthusiastic a reception as must have dispelled the Chancellor’s dream that he was the popular idol; but once more we must remark that the extreme reformers, to whose vision Lord Brougham’s political character appeared clothed in new colours, were labouring under an optical illusion. Again, at a public dinner in Salisbury, if we mistake not, Lord Brougham took occasion to throw out a challenge to the Earl of Durham to meet him, face to face, in the House of Lords; whereupon the noble Earl, having been invited to a banquet at Glasgow, retorted thus upon Lord Brougham: “ He has been pleased to challenge me to meet him in the House of Lords. He is aware of his great superiority over me in one respect: he is a practised orator and powerful debater: I am not. . . . I know, too, that in any attack he may make upon me in the House of Lords he will be warmly supported by them. With all these advantages over me, I will meet him there, if it be unfortunately necessary to repeat what he has been pleased to term my *criticism*.”

A few months soon stole away, and, on the 14th of November, the ministry was dismissed.¹ Lord Melbourne, when he

¹ Not a few believed, and still believe, that the fact of the Melbourne ministry having been dismissed was, in the first instance, communicated to the *Times* newspaper by Lord Brougham himself. We are not in the secret; but on what foundation did the rumour rest? Why, simply this,—

waited on the King, at Brighton, suggested the possibility of modifying the old Cabinet by the appointment of Lord John Russell to the leadership of the House of Commons. His Majesty, however, declined to accede to the proposal, and immediately had recourse to the counsels of the Duke of Wellington. His Grace at once undertook the responsibility of the government until Sir Robert Peel, who happened to be in Italy, should return to England. In the mean time, on the 21st of November, 1834, Lord Brougham, after delivering judgment in the case of *Kennedy v. Green*,¹ and dropping a few very justifiable remarks upon the assiduity and celerity with which business had been despatched by him, resigned the Great Seal, which was forthwith handed to Lord Lyndhurst. While these arrangements were in progress, Lord Brougham, we regret to add, intimated to his successor that he was willing to accept the office of Lord Chief Baron, without any salary beyond his pension as a retiring Chancellor. His noble friend met the proposal with a polite evasion. Lord Brougham appears to have been, on reflection, sensible that he had taken a false step, and lost no time in trying to recover himself. He had left England; but "letters came flying back from Dover, Boulogne, and Paris, like the arrows of a Parthian in retreat;" and in one of them he requested that his offer of gratuitous services might be considered as withdrawn. It is not probable that it could have been for a moment seriously entertained by the new administration. Parliament was dissolved on the 29th of December, 1834, and another was summoned for the 19th of February, 1835.

Although far from being unscrupulously, or even unduly ambitious, Lord Brougham, having once tasted that power is sweet, had no objection to taking a tolerably long and deep draught of the soothing potion. The chalice having been raised to his lips, he felt the exhilarating, though not intoxicating, influence

that "the paragraph announcing the king's *coup d'état* is said to have been left by a tall man muffled up in a cloak, whose features could not be recognised"—language more romantic than intelligible: the writer must have been fresh from the perusal of Mrs. Radcliff's "*Italian*," or some other kindred work of mystery.

¹ *Vide* Mylne and Keen's Rep. vol. iii.

it warm," until, at last, it found vent in an explosion of unwonted political rancour.¹

Amidst the struggles for power, however, and the quarrels of faction, the general interests of the empire were not forgotten by him ; nor can we without marvel and admiration contemplate the energy of that mind which, under constant pressure and in a state of extreme tension, persevered in pondering with caution and discussing with precision all the various political, social, and ecclesiastical questions which, from day to day, necessarily spring up in a vast and complicated community. In the mean time, the strong and practised eye of Lord Brougham had pierced the mists of party, and within the scope of its vision had embraced the whole political horizon. His anticipations that a Conservative government must eventually prove itself unable to meet the existing crisis of affairs were destined to be speedily realized, and his predictions of failure on the part of the Duke of Wellington to form even a tolerably efficient government, or rather any enduring government at all, were fulfilled. Lord Brougham, it is true, had very much at his command the elements upon which the truth of his prophecy must ultimately have depended, and of these he failed not to avail himself. Accordingly, the tenure of office by the Duke and Sir Robert Peel was of extremely brief duration. Nothing, however, beyond the fact that the government was tottering to its fall, out of the usual routine of parliamentary business, occurred to attract public attention until the 7th of April, 1835, when Lord John Russell carried his resolution on the subject of the temporalities of the Church of Ireland. Lord Melbourne again resumed the reins of government. Lord Brougham, however, was not invited to take once more his seat on the woolsack : even supposing that the aristocratic Whig leaders had not objections to his return to office, such an appointment must have been extremely hazardous to the permanent ascendancy of their party. That he felt the blow aimed at him

¹ *Vide* H. P. D. 3rd ser. vol. xxvi. pp. 88 *seqq.* (24th February, 1835) ; but in justice to Lord Brougham, we refer the reader to " *Speeches* " *et cetera*. vol. iv. *Intro.* pp. 79 *seqq.* ; where his Lordship's views of the state of parties and the constitutional doctrines applicable to that state may be seen.

by his friends is beyond all doubt: he was the lever by which the government of their predecessors had been constantly moved and at last overturned. The very anxiety which he displayed to indicate his indifference disclosed the wound which had been inflicted; but his feeling partook more of mortified pride than of blighted ambition. Popular favour, ever fleeting and uncertain, had been withdrawn from him; and yet his great and only party was the commonwealth, his simple and constant aim being the welfare of the people.

But no human strength, mental or corporeal, could without exhaustion bear demands so severe and unceasing as were those to which the energies of Lord Brougham had through many long years submitted. Is it wonderful, then, that, even while many topics were attracting his attention, he longed for a temporary retreat from the more noisy and exciting scenes of labour and conflict? The ministry was suspicious of the uncertain aid which he occasionally proffered to it, while by the Opposition lords he was still watched with jealousy. In colossal strength he stood between the two contending hosts, and threw out defiance to them both. He was not unwilling, however, that the campaign, though not the war, should be brought to a close. He resolved, therefore, to call in his out-lying picquets, and, for a time, to quit the field. Egotism,¹ impatience,² and peevishness³ were occasionally though slightly stealing over his genial, generous nature. The fruits, which were not throughout the summer sweet, had, at the approach of autumn, become positively bitter;⁴ and pelting the whole body of his fellow peers with his last sour grape, under cover of an axiomatic

¹ *Vide* his vindication of his consistency on the subject of education (2nd April, 1835): our inference is drawn not so much from the matter as the tone of his defence; *vide*, also, his remarks (15th May, 1835) with reference to the resignation of the Marquess of Wellesley; and his observations as to his being the "Author of the Central Criminal Court" (4th June, 1835).

² *Vide* his rebuke of the House for the delay which had taken place in getting through its legislative business.

³ He complained (6th July, 1835) of the slovenly manner in which Select Committees of both Houses of Parliament adjudicated in the affairs intrusted to them.

⁴ "The noble Marquess may do as he pleases," abruptly said Lord Brougham to the Marquess of Salisbury (3rd September, 1835); "I have no power here any more than any one else on this side of the House."

truth,—“I am well aware your lordships are quite entitled to give your votes upon subjects of which you know nothing;” he withdrew from the arena. On his departure, combatants and spectators breathed more freely.

During the calm let us follow Lord Brougham into his retirement that we may, even though by anticipation, have a glimpse of the pursuits in which his tastes¹ found a gratification and his intellectual powers an exercise infinitely preferable to the pleasures of sense or to inert repose. He may now “affect the sun” and now “the shade;” but lead us whithersoever he will, into the most brilliant circle of French *savans*, or the seclusion of the *Château Eléanore-Louise*,² we may rest assured that he conducts to scenes favourable alike to the improvement of the mind and of the heart. Besides miscellaneous essays which, from time to time, appeared in the “*Edinburgh Review*,” and which were generally known to have proceeded from the pen of Lord Brougham, and occasional articles which, it was alleged, met the public eye through less authoritative channels and on trivial topics,³ he revelled with delight amidst the rich stores of science⁴—science, too, in connection with the loftiest of

¹ *Vide* his Speech at the Royal Academy Dinner (30th April, 1831).

² Lord Brougham's Seat at Cannes in Provence.

³ It was whispered, for instance, that a notice which appeared in the *Times* (27th September, 1834), of an “*Essay on the Archæology of Popular English Phrases and Nursery Rhymes*, by John Bellenden Ker, Esq.,” was written by Lord Brougham. We are familiar with the various editions of the curious little work alluded to as well as with the review of it in the *Times*; and while we cannot sympathize with the elaborate trifling conspicuous in the one, we are inclined from internal evidence to doubt whether the other was from the pen of Lord Brougham.

⁴ The “*Discourse on the Objects, Pleasures, and Advantages of Science*,” was originally published as the Introductory Treatise to the “*Library of Useful Knowledge*.” The “*Discourse on the Objects, Pleasures, and Advantages of Political Knowledge*,” was published at a later period, as the Introductory Treatise to Lord Brougham's “*Political Philosophy*.” Both of these “*Discourses*” were subsequently (in the year 1846) reprinted in one volume. The “*Political Philosophy*,” a bulky and valuable work, was likewise published under the superintendence of the Society for the Diffusion of Useful Knowledge. Part I. of that Treatise comprises the general principles of government, the peculiar principles of monarchical government, as well as the history and structure of the different monarchies of Asia and Europe. In Part II. is discussed the nature of Aristocracy; and in that portion of the work is embodied a vast amount of accurate information concerning the constitution of society both in ancient and modern times—one branch of the subject being a sketch of the con-

themes.¹ His "Discourse on Natural Theology" is too well known to require remark or commendation. In that treatise he argues conclusively in defence of the Being and Attributes of God: he combats the actual atheism of materialists as well as the virtual atheism of speculatists; and he establishes the natural immortality of the soul, in other words, its *continuous consciousness*, which is the essential quality of the human mind, its *oneness, spirituality, incapacity of division or dissolution*. With these grave philosophical inquiries Lord Brougham found leisure to blend the elegant pursuits of classical literature. Late in life he applied himself to the acquisition, or rather revival of his former knowledge, of the Greek tongue; and it is well known that in this department of study he received material aid from the late Mr. Justice Williams—one of the best scholars of his day. Demosthenes caught the fancy and quickened the ambitious rivalry of Lord Brougham; and, accordingly, in the year 1840, he gave to the world a Translation of the

stitution and machinery of the various governments of Italy; and Part III. is devoted to the exposition of the principles of constitutional polity. These parts were published in the course of the years 1842, 1843: the first two parts were gracefully and loyally, though in no fawning spirit, dedicated to her Majesty, Queen Victoria; while the third part, presenting a view of democracy and mixed monarchy, was aptly inscribed to the late Earl Grey, "as a token of that friendship which has lasted during his whole public life, and of the veneration which, in common with men of all classes and all nations, he cherishes for a statesman, whose virtues have rarely been equalled and never surpassed."

¹ The "Dissertations on Subjects of Science connected with Natural Theology," formed the concluding volume of a work which appeared in the year 1836, under the title of "Paley's Natural Theology, with illustrative Notes: by Henry, Lord Brougham, *et cetera*;" to which are added, Supplementary Dissertations: by Sir Charles Bell." The "Dissertations" were republished in the year 1839, and were dedicated to Lord Denman, "as a token of respect for his great endowments, and esteem for his public conduct." The first volume comprises "Dialogues on Instinct," in which will be found many shrewd remarks on the theory of instinct, and many facts illustrative of animal intelligence; along with observations, demonstrations, and experiments, upon the structure of the cells of bees. His lordship narrates a few good stories, which show that he is quite alive to the humorous (*Vide* "Dialogues on Instinct and Fossil Osteology," 12mo. Lond. 1844). The second volume contains a "Dissertation on the Origin of Evil," in which the celebrated work of Archbishop King is examined and criticised with fearless freedom; a curious note on the Resurrection; an Analytical View of Researches in Fossil Osteology, and their application to Natural Theology; and remarks on the "Principia" of Newton, "a work which is justly considered by all men as the greatest of the monuments of human genius."

Oration on the Crown.¹ In the field of English biography, too, Lord Brougham has distinguished himself. He felt that no more authentic account of any age, its transactions, the springs which regulated the conduct of men, and the merits of the various actors throughout its scenes can be obtained than by studying the personal history of the eminent individuals who may have mainly guided its affairs, and marking the characters which, by their influence, they impressed upon the times in which they lived. Accordingly, between the years 1839 and 1843, appeared his "Historical Sketches of Statesmen who flourished in the time of George III.;"² and that series was

¹ "The Oration of Demosthenes upon the Crown, translated into English, with notes and the Greek text, with various readings selected from Wolff, Taylor, Reiske, and others: by Henry, Lord Brougham, F.R.S., and Member of the National Institute of France. Lond. 1840." But compare "A Review" of that translation which appeared originally in the *Times* newspaper, and was subsequently published by Whittaker. The critique displays accurate scholarship, an accomplishment to which, in its highest sense, Lord Brougham has no pretensions; but we have no sympathy with the spirit in which that criticism is written: one cannot read the first two pages of it without detecting the cavilling temper of the author. At the same time, the fact of Lord Brougham's knowledge of Greek being superficial is obvious in every page of his translation: we do not allude to the evaporation of all the strength and beauty of the original—that was to a great degree inevitable—but to positive verbal misapprehensions and inaccuracies. Lord Lyndhurst, no incompetent judge on such a subject, predicted, we believe, that his friend's translation would be "nothing to brag on," inasmuch as the closeness, the vigour, and rapidity of Demosthenes could only be seen "as in a glass, darkly." Lord Brougham has published other specimens of translation from the ancient orators: for example, the Oration of Demosthenes "on the Affairs of the Chersonese" (ὁ περὶ τῶν ἐν Χερσονήσῳ); that "for the Independence of Rhodes" (ὁ ὑπὲρ τῆς Ῥοδίων Ἐλευθερίας); and a third specimen of his powers in that walk of mental exercise is a translation of the peroration of the second Philippic of Cicero against M. Antony. In a dissertation by Lord Brougham on the Eloquence of the Ancients (dedicated to Mr. Justice Williams, on the 25th of April, 1838), he, with great justice, ascribes the immeasurable superiority of the ancient orators partly to the greater power of the languages (especially the Greek), in which they clothed their thoughts; and partly to the art of oratory being, among the ancients, one of eminent display: the nature of their institutions, too, was extremely favourable to the growth of manly eloquence. The Press has, in modern times, superseded the necessity of public orations.

We may be allowed, without presumption, to add, that admirable specimens of translation are to be found interspersed throughout the "Histories of Greece" by Mitford and Thirlwall respectively: they are invaluable as perfect models for the imitation of the young scholar.

² The work was speedily translated into the French language under the title—"Esquisses Historiques des Hommes d'Etat du temps de George III.,

followed by another, comprising a full and elaborate view of the learned men who flourished during the same epoch.¹ These works are so well known and so highly appreciated, that to enter into minute criticism of their merits would be indeed a superfluous task. To educated and reflecting minds these productions supply ample materials for thought: they are precisely what they affect to be—"Sketches," not "Lives:" they are portraits thrown off by the hand of a master; and, accordingly, while they are defective in respect of fulness of detail, all the strong features are caught and presented in striking colours to the mind of the reader. The style is, upon the whole, more simple and elegant than those who know Lord Brougham only by his speeches may be disposed to believe: there is freedom blended with elegance of diction: the sprightliness of the author never exceeds the limits of good taste: a strain of vigorous thinking is relieved and graced by chaste and apt illustrations; and the tenacity with which his lordship clings to his own political creed and even his political prejudices, is always cheerfully relaxed in the generous admiration of moral worth or intellectual power.² His political opponents

traduites de l'Anglais et accompagnées de Notices et de Reflexions historiques: par A. Legray. Lyons, 1847." Lord Brougham is so accomplished a French scholar, that he might have himself performed the task of translation. In the year 1846 he published "*Voltaire et Rousseau*: par Henry, Lord Brougham, Membre de l'Institut de France, de la Société Royale, et de l'Académie Royale de Naples, *et cet.*; ouvrage accompagné de Lettres entièrement inédits de Voltaire, d'Helvétius, de Hume, *et cet.* Paris, Librairie d'Amyot, Editeur, 6, Rue de la Paix, 1845." His object in that work is to arrive at a just appreciation of these two extraordinary men; who, Lord Brougham thinks, have been misunderstood, in consequence of those who have attempted to portray the character of each, being the slaves either of personal or party prejudices: "L'esprit de secte d'une part, l'esprit d'incrédulité de l'autre, ont égaré les juges de Voltaire; le sentimentalisme, avec l'esprit de secte, ont influencé également ceux de Rousseau." The Preface is dated, "Au Château Eléanore-Louise (Provence) ce 15 Janvier, 1845."

¹ "Lives of Men of Letters and Science, who flourished in the time of George III.: by Henry, Lord Brougham, F.R.S. London, 1845."

² *Vide*, for instance, Lord Brougham's character of Pitt; but compare "Lord Brougham's character of Mr. Pitt: by John Sibbald Edison, of the Middle Temple, Barrister-at-law. London, 1842." The reader may, also, consult "A Letter to Lord Brougham and Vaux, by the Marquess of Londonderry: London, 1839." In this "Letter" are contained, as may be supposed, strictures upon Lord Brougham's delineation of the character of the late Lord Castlereagh. We must, at the same time, refer the reader

must admit that, making due allowance for Lord Brougham's opinions and predilections, he is impartial; he was obviously more intent upon giving faithful than highly-coloured pictures. In his political sketches he displays extensive and accurate knowledge of public affairs, the state of parties, and the character and aims of individuals; while in the series illustrative of the career of men of letters and science—whether these happen to be English, Scotch, or French—every page teems with acute and candid criticism. Dr. Samuel Johnson was of opinion that, as a strong man can walk either east or west, so one of vigorous intellect may turn his powers to account in any department of inquiry; and trusting, perhaps, to the soundness of this questionable theory, Lord Brougham, it was whispered, about the year 1844, having displayed his powers and commanded a place in the provinces, respectively, of physical, moral, and political science, wandered for relaxation into the region of romance.¹ It would be impertinent to dogmatize upon this subject; but, judging from internal evidence, there were reasons, we think, for believing the conjecture to have been well founded. The few sentences in the dedication by which the author hopes to avert suspicion remind one of Lord Brougham's sentiments and style; and the suspicion once awakened as to the real paternity of this child of fiction approaches to certainty when we arrive at his criticisms—his remarks especially on the French preachers and the Greek orators. The sarcasm, too, with which the pages are sprinkled, is the essential salt of Lord Brougham's style: the picture, for example, of the Chevalier André-Agneau—the Knight of the woeful Countenance—is in perfect keeping with Lord Brougham's estimate of Sir Andrew Agnew's extreme opinions concerning the observance of the Sabbath. In short, the opinions and language of Father Jerome resemble the opinions

to Lord Brougham's "Answer to the Marquess of Londonderry's Letter: London, 1839." His reply is written in a spirit of perfect fairness and great kindness.

¹ In the course of that year a novel under the title of "Albert Lunel; or, the Château of Languedoc" (12mo. London), was printed, although not published by Mr. Knight. It was dedicated to Mr. Rogers, the poet, and was generally attributed to the pen of Lord Brougham.

and language of Baron Brougham and Vaux. The descriptions of external scenery strike us as being the most pleasing scenes in the book ; while, probably, aristocratic dames, old and young, will be more curious to know how he, before whom as orator their sires and husbands have trembled, can breathe of gentleness and love.

Lord Brougham had supported the ministry in the year 1835; and throughout the year 1836 he abstained from active hostility to the second Melbourne administration. He had indeed yielded to the latter a tacit support, until he found, as he conceived, the leading members of it disclaiming their first principles by objecting to improvements on the Reform Bill; by trifling with the great question of slave-emancipation; by framing their civil-list upon exploded principles of finance; by exercising undue influence over the royal household; and, above all, by their having, without valid reason, suspended the constitution of Canada. His spirit, we have seen, was hot before he withdrew into voluntary seclusion from public affairs, and the development of ministerial opinions and policy had not tended to cool him. The furnace was still in blast, and ere long the flame burst forth to scorch. His adhesion, on the one hand, or opposition, on the other, to the ministry depended entirely upon the course which the government chose to pursue. While some of his friends receded too far from liberalism, and others would have rapidly and recklessly advanced, he, without being open to the charge of inertness, remained firm in his old creed. Wisdom and honesty are essential elements in the character of a great statesman; and the only test of both is consistency, that is, consistency with himself, and not an uncertain blindfold movement in the leading-strings of faction. Continuous, circumspect progression is the hinge upon which Lord Brougham's political action has uniformly turned. As in mathematical geography the term *position*, being strictly a relative one as applied to a body, has no meaning unless there be some other body or mark which is fixed and to which the first body may be referred, so in politics we must, when we talk of the position of a public man, so far as consistency is concerned, keep in view the fixed body of principles professed by himself and by those

who, along with him, have formed themselves into a party known by a distinct appellation : the principles are invariable, although the men professing them may have, no doubt, departed from them in this or that direction. Now, Lord Brougham is still identified with his original political opinions : his former associates, however, have alternately receded from and advanced beyond them. Accordingly, his alienation from the Whig party gradually became more decided and directly avowed, while, at the same time, he disdained to throw himself pettishly into the ranks of the Conservative peers. The constitutional government of Canada had become the touchstone of the real consistency of English statesmen : the subject had attracted the attention of Lord Brougham ; and he was quite prepared to turn aside contemptuously the courteous irony of Viscount Melbourne, to accept in silence, if not with approbation, the lucid statements of Lord Glenelg, or arrest in its course the turbid fury of Lord Durham. His running commentary on the Canadian despatches was executed in a most masterly manner, and bore deeply the impress of his peculiar powers : it was alternately a torrent of indignant invective and blistering scorn—a mixture of solemn warning, grave rebuke, and biting sarcasm ; and so thoroughly was his heart in the subject, that the varying passions which swelled within his bosom, and by which his audience was for some hours swayed at will, could be traced in the impassioned manner of the orator, while the objects of his attack were seen to shrink from his withering scowl, or tremble beneath the thunders of his declamation.

Although exposed to much¹ which was, as Dogberry says,

¹ In the autumn of the year 1839, Lord Brougham became the subject of a stupid and heartless hoax. He was in Westmorland : a rumour was, on the evening of the 21st of October, extensively circulated in London, that he, along with some friends, had been thrown from his carriage, and that his Lordship "had been killed by a kick on the head from one of the horses." The *Morning Post* and the *Morning Chronicle* proved their belief of the rumour by publishing—each according to its appreciation of Lord Brougham's character—on the following morning an obituary notice, in which much shrewd criticism and many well-turned periods were lavished in vain. The *Times* was more cautious ; but could not resist the temptation of rivalling its contemporaries in delineating the character of Lord Brougham, on the hypothesis that he was a dead man. *Vide*, in the *Morning Post* (23rd October, 1839), a letter from the Comte d'Orsay : compare the "Annual Register," vol. lxxxi. pp. 209, 210.

"most intolerable, and not to be endured," Lord Brougham had within himself sources of quiet satisfaction to which his foes must have been utter strangers; for while in such skirmishes these exhausted their strength and seemed to have accomplished their vocation, Lord Brougham rushed through them as trivial and inevitable interruptions to great legislative operations concerning the progress and ultimate success of which he was deeply anxious. Roman soldiers were, of old, allowed in the field of battle to write their wills upon the bucklers and scabbards which they wore: Lord Brougham has, amidst the din of political warfare, transmitted to his fellow-countrymen, in the gift of universal education,¹ a legacy which is above all price. From the year 1825 down to the present day, his exertions in Parliament or through the press have never been in that field of labour relaxed; and at no period during the interval which has elapsed was his mind more intent upon moulding his plans into a form which might be generally acceptable than during the years immediately subsequent to his retirement from office.

Lord Brougham continued to pursue the same course of independent action with reference to all the questions of the day. But old age was stealing on apace, and the tastes of his youth were, we have seen, revived to cheer him; these being more genial than politics to him in his declining years. His position in the House of Lords became, day by day, more remote from either of the two great parties in the state; and his speeches related much more to the advancement of national interests²

We may mention that it was during that same month (October, 1839) that Lord Brougham presided at the banquet given to the Duke of Wellington, at Dover.

¹ *Vide* H. P. D. 3rd ser. vol. xxxviii. p. 1619 (26th June, 1837); compare "A Letter to the Duke of Bedford on National Education, from Lord Brougham: Edinburgh, 1839;" and "A Letter to Lord Lyndhurst from Lord Brougham, on Criminal Police and National Education. 1847."

² *Vide*, for example, his Speech on the Ashburton Treaty (7th April, 1843); "Speech of Lord Brougham on the Criminal Code in the House of Lords, on the 13th of May, 1844: London, 1844;" and his Speech on Law Reform, 19th May, 1845; compare "Letters on Law Reform to Sir J. Graham from Lord Brougham: London, 1843;" and his "Speech in the House of Lords (12th May, 1848) on Legislation and the Law: London, 1848." In this speech he takes a wide range. *Vide*, also, "A Letter to Lord Denman from Lord Brougham on the Legislation of 1850, as regards the Amendment of the Law: London, 1850." But compare "Notes

and to the general welfare of the people than to the triumph of this or that political faction. The same spirit pervaded him throughout the long administration of Lord John Russell; and he gave full credit to the ministry of the Earl of Derby, and especially to Lord St. Leonard's as Chancellor, for their progress in Law Amendment.

We abstain from dilating upon the political movements in foreign kingdoms: we would simply allude to one or two points with a view to illustrating the character and unfolding the opinions of the eminent subject of this sketch.

As a general principle, he strongly disapproved of intervention with the internal affairs of other states during periods of revolutionary action: while he considered indisputable the right, in the event of a nation having succeeded in disowning one government and having *de facto* established another constitution, of recognizing the new form of government, still the exercise of that right must depend, he conceives, upon the circumstances of each particular case: the exercise of it may be controlled; nay, the very existence of it may be limited.

The year 1848 was one of the most remarkable in the annals of the world: the foundations of the great deep of political society throughout Europe were suddenly and violently broken up: the continental governments were not in accord with the principles, and consequently commanded not the sympathies of the people. In England, Parliament was happily the reflex of popular opinion and sentiment. Never was the security which this country derives from its free constitution more signally exemplified than during that year of political agitation. On the continent crowns were lost and thrones were overturned: the English mixed monarchy stood firm in the tempest, and seemed even to acquire increased stability from the events which convulsed foreign kingdoms. The unsettled state of Europe struck

upon some Passages" in that "Letter," by Charles P. Cooper, Esq.: London, 1850. Only fifty copies of this pamphlet were printed for private circulation. We refer the reader, also, to his Speech in the House of Lords (11th April, 1851), on the Law of Evidence; and to his "Inaugural Address on the Establishment of a Law School:" this address was delivered by him as President of the Society for promoting the Amendment of the Law, at the room of the Society, in Regent Street, on the 3rd of July, 1850.

the sagacious mind of Lord Brougham with dismay : he beheld everywhere the elements of mischief. While the storm of civil discord screamed and raged furiously, Lord Brougham rose a tower of strength against which the waves were broken. At Rome and at Turin all was uproar and confusion : the Pope and Charles Albert having, each in his sphere, lost their wits, upon bishop infallible and monarch unprincipled Lord Brougham lavished his bitterest invective.¹

At the same period a great crisis had arrived in the affairs of France. The result of the revolutionary movement was the abdication of King Louis Philippe and the formation of a democratic government, of which Dupont, Lamartine, and Ledru Rollin, were the leading members. Of all these events in the French capital Lord Brougham was a keen observer. Fully aware of the defects in the constitution which the French people then enjoyed, he still believed that it was such a system of policy as secured to that country all the advantages of a popular government : he therefore condemned the rashness² of the revolutionists ; because, instead of attempting to reform the system by lawful means, or to dismiss the ministers who had given offence, or to inflict punishment for such offence through the common course of justice, the indignation of the Parisian multitude suddenly burst forth into fury, in consequence of a public banquet having been prohibited and a procession prevented. While loving liberty, Lord Brougham deplored the French revolution of 1848 ;³ and true indeed it is, that men utterly incom-

¹ *Vide* his "Speech in the House of Lords, on the 11th of April, 1848 : London, 1848"—pp. 9, 17, 18 ; but compare a pamphlet "On the Formation and Constitution of a Kingdom of Upper Italy, in a letter to Viscount Palmerston, by Augustus B. Granville, M.D. : London, 1848"—particularly pp. 31 *seq.* ; and "The Italian Question : " London, 1848—pp. 15 *seq.* ; this is a second letter to Lord Palmerston from the same author. But for Lord Brougham's general opinions on foreign affairs, *vide* his "Speech in the House of Lords, on the 20th of July, 1849 : " Ridgway, 1849. In the course of this speech he branded Mazzini and Garibaldi as being "professional conspirators ;" we cannot, however, altogether agree with Lord Brougham in this denunciation.

² Lord Brougham was not blind to what he conceived to be the national frailties of our lively neighbours. See H. P. D. 3rd ser. vol xxiv. pp. 1334, 1335.

³ *Vide* "Letter to the Marquess of Lansdowne on the late Revolution in France," by Lord Brougham, particularly p. 13, and compare the Preface to the fifth edition of that "Letter."

petent to construct, may easily disturb or destroy a system of government: they may not be able even to control, still less to quell, the spirit which they have called into life. As at Endor, of old, the boldest quake before the phantom which they have presumptuously evoked. "God does not grant," profoundly remarks M. Guizot, "to those great men who have laid the foundation of their fortunes amidst disorder and revolution, the power of regulating, at their pleasure and for succeeding ages, the government of nations." "I dispute not," said Lord Brougham (11th April, 1848), in mingled accents of scorn and commiseration, "the right of five-and-thirty millions to bear the dominion of twenty thousand; and of the other things which the chief of these men are now doing every day in the name of the whole people, we have no right to complain: their fruits, their bitter fruits, will be gathered by themselves: my prayer is, that they may be less bitter than I dread and believe."

Lord Brougham also publicly denounced the party of the "Mountain," designating the Red Republicans as "those degraded characters, and their still more contemptible and degraded leaders, who, by issuing orders from London, where they are protected, are doing all they can to stir up dissatisfaction and enmity between the French people and the French government." He characterised "the vile Red party" as "miscreants who ought not to be recognised or received by any man who valued his character, throughout the whole extent of Great Britain."¹ But this language, we venture to think, was not sufficiently discriminative of different parties, or, more strictly speaking, sections of the same party. Those adventurous individuals who deal in revolutionary agitation are, no doubt, frequently "clouds carried about by winds, raging waves of the sea, stars to which is reserved the blackness of darkness." We know, upon high authority, that in all political ebullitions the scum rises to the surface; or, to take another illustration, volcanic political action resembles the phenomenon in the island of Java, which, commencing with smoke and sound, explodes in a sudden

¹ *Vide* H. P. D. 3rd. ser. vol. cxi. p. 159 (16th May and 17th May, 1850).

eruption of foul sulphureous mud. It is a law, too, in the moral government of the world, that the comparatively innocent should, on great emergencies, suffer along with the guilty: the wheat cannot always be separated from the tares; and, accordingly, we cannot altogether acquiesce in Lord Brougham's general sentence of condemnation pronounced against the republicans of France. But, in point of truth and fact, his denunciation was too sweeping. We are all too apt to take a vague view of foreign politics, and to confound persons and principles which ought, in common justice, to be kept distinctly apart. The terms Socialism and Communism, for instance, (the one indicating a system totally different from the other), are, by superficial thinkers, regarded as synonymous; and, in like manner, the characters of the men who advocate the doctrines of Socialism as well as the objects, however chimerical, which those men have in view, are misunderstood: some of these theorists are actuated by pure, though mistaken, patriotism, while others are goaded on to conspiracy and turbulence by selfish ambition.

But, while we may show kindness and even respect towards those political malcontents who swarm in every capital of Europe except that of the country to which they are bound in affection by ties of blood, and to which they, by reason of their ill-regulated aspirations after freedom, dare not return, there are no fictions, it must be confessed, so wild as those which are engendered during paroxysms of popular fever in the brains of ardent politicians and social reformers. Thus it happened that, promises having been made which could not be fulfilled, disappointment and discontent arose, and the party which dethroned Louis Philippe was forthwith split up into sections,¹ revolting against and reviling each other. The truth is, that government is a practical, not a theoretical affair; and accordingly Plato, in his

¹ The language of Cæsar seems applicable in the present day: "In Gallia non solum in omnibus civitatibus, atque in omnibus pagis partibusque, sed pene etiam in singulis domibus *factiones* sunt."—Cæs. de Bell. Gall. lib. vi. cap. 2. Strabo appears to have been much of the same opinion:—"Το συμπαν φυλον Γαλλικον ἀρειμανιον τε και θυμικον εστι, και ταχυ προς μαχην;" but he admits that they were brave and generous: "αθροοι συνιασι προς τους αγωνας, και φανερωσ, και ου μετα περισκεψεως." Vid. Dissert. de Celtis seu Gallis, contained in vol. i. pp. 484, *sqq.* of the Bibliotheca Classica, by Lemaire.

magnificent idea of a republic, was not so anxious about the form of the government, as concerning the moral fitness of his citizens. If the intellects of Plato and Cicero, of Locke and Montesquieu, have failed to define or describe the best possible form of civil polity, can men be so besotted as to expect the problem to be solved by such dreamers as St. Simon, Fourier,¹ or Robert Owen.² It is a singular anomaly in the history of the world, that individuals affecting to be regenerators of their race should throw aside those restraints which reason suggests as necessary to the purity and peace of society, and strive to obliterate from the minds of the young the sacred impressions stamped by Nature herself; and yet, in France, men and women who abnegate family ties, and avow a lax, gross materialism, are, to serve their own ends, particularly ambitious of being the instructors of youth. Lord Brougham regarded Socialism² and Communism³ as twin monsters, and uniformly guarded the people of

¹ We include Fourier, the founder of the Phalansterian School of French Socialists; for while we admit that he combined strong logical powers with accurate observation, he was nevertheless, in many respects, a pure idealist. Certain wild intuitions possessed him: he believed, for instance, that the world would last precisely 80,000 years, and that the globe had been originally peopled by exactly sixteen races of men.

² An attempt made by the French government towards the close of 1849 and the beginning of 1850, to stay the progress of the plague of Socialism by the dismissal of the Prefects of Departments who had been appointed by M. Ledru Rollin, was only partially successful.

³ The Nicolaitanes, we know (Apocalypse ii. 15), an early sect of heretics, the disciples of Nicolas, one of the first deacons, held, among other offensive tenets, the doctrine that wives ought to be common. But we learn from the facts detailed in an extremely interesting and well-written *brochure*, which appeared under the title, "*Le Berceau du Communisme en Perse*;" Par Madame Guillard Mn.: London, 1854," that the disgusting idea of communism is of oriental origin, and sprung out of a desire to overthrow the monopoly of women which the rich enjoyed in their seraglios. The sketch of M. G. M. presents topics for meditation to the historian and statesman, to the philosopher and moralist. The great merit of the piece consists in the adjustment of its parts, in the concentration of facts and incidents, drawn from various recondite sources for the illustration of one remarkable era in the history of the East: this *brochure* is another proof that "*dans les petits pots sont les bonnes épices*." It has emanated from no common mind. Madame G. M.—we venture not even gently and respectfully to withdraw the veil, thin and transparent though it be, which she has with unnecessary diffidence thrown over herself—is obviously equal to the task of unfolding the philosophy of history. To all feminine graces and accomplishments she adds a warm love of polite literature, and a still more impassioned devotion to the cause of civil liberty—that form of freedom, above all, which may contribute to the prosperity and happiness of the industrious,

this country against the acceptance or diffusion of theories which poison the heart and degrade the life of all who adopt them, and which could not fail to taint the purity and mar the happiness which hallow English homes. Under such influences the social and moral world, which has been for ages advancing in civilization and developing itself into forms of beauty, harmony, and order, must be dissolved into their original elements, and be thrown back into a state of chaotic confusion. This social leprosy would prove a more fatal curse than any that escaped from the fabled box of Pandora.

Lord Brougham has, down to the present day, persevered in the discharge of his public duties. He voluntarily undertook the arduous task of presiding at the meetings of the Judicial Committee of the Privy Council; and he has been always ready to relieve the learned lord on the woolsack, whenever the latter happened to be called elsewhere, or through indisposition has been prevented from attending the House of Lords, from the labour of hearing appeals; and these functions he has discharged with a regularity, application, and skill which called forth eulogy from the entire Profession.

The aspect of European governments, since the period when Lord Brougham assailed the Holy Alliance, defended the rights of limited monarchy, and vindicated the liberties of the people, has been gradually, though very materially, changed, and from crowns is reflected a milder lustre over their various dominions. He has renounced no fundamental principle of his creed; he has formed no associations inconsistent with or unworthy of the dignity of the crown or the best interests of the people. Intent upon the establishment of free governments, as so many cradles of human progress and happiness, he still, as in early life, resists the demands of rabid democracy on the one hand, and would

though humbler classes of society. Many striking and instructive episodes are interwoven with the stormy and ever-changing scenes of the Italian republics; and still more are profusely strewed throughout the earlier annals of her native land, all tending to illustrate human character, and throw light upon the progress of social institutions; and, judging from this specimen of her talents and attainments, we believe that by the pencil of no other writer could such scenes be more pleasantly and vividly sketched than by that of Madame G. M. A volume of such episodes from such a pen could not fail to meet with success in England as well as in France.

stay the march of barbaric despotism on the other. England, he knows, rejoices not in the sound of the war-trump, or the neighing of the war-steed: she boasts not of being a military monarchy: our Island-Queen reigns over a people which would rather cultivate the arts of peace; and it is only, as recent events have proved, upon occasions of solemn pledges having been forfeited and international rights infringed by reckless ambition, that Britannia buckles on her armour, and, like the Amazon of ancient legend, rushes to the field in defence of freedom and the most precious rights of man.

By no protracted inquiry could we detect new motives by which Lord Brougham has been actuated; no feature of mind, hitherto concealed, could strike the eye: all the elements for deciding upon his character, whether the judgment is to be recorded by his cotemporaries or reserved for posterity, have been already brought prominently into view; and we would not trifle with our readers by luring them from the prolific soil which we have been treading to guide them over a comparatively barren waste. Here, then, let us pause and reflect.

On taking a retrospect of the multifarious topics to which our attention has been directed, we can only feel regret at having traversed too rapidly so rich and varied a field. Of many public men it is not difficult to trace the course: they have generally moved in one circle and been distinguished in one department of intellectual exertion. But the genius of Lord Brougham took a wider range, and, to mark even its outline, knowledge and reflection are required. We have not presumed to give expression to unjust censure, still less have we indulged in lavish panegyric; for "no ashes," truly remarked Walter Savage Landor, "are lighter than those of incense, and few things burn out sooner." Claiming, as Lord Brougham himself has always done, independence of thought and liberty of speech, we have written without party-spirit or prejudice, in the hope that all might appreciate, and some, at least, embrace the principles of action which he uniformly approved, and with few exceptions practically recognised. Adhering as much as possible to the chronological sequence of events, we have been at the same time desirous of throwing such lights upon each successive era

as could be drawn from the scattered labours and opinions of Lord Brougham at various times, though on kindred subjects and occasions. We have endeavoured to be copious without diffuseness, and accurate without encumbering our pages with wearisome details. This is a sketch, not a full-length portrait. That the picture might be complete, the artist would find it requisite to trace minutely the events of the era in which Lord Brougham lived. Our simple object has been to mark with discrimination his long career; and we have seen him moving on, from first to last, undaunted though unaided, to the joyous fulfilment of his destiny. In this delineation of his outward acts is, to a great extent, included a history of the mind by which he was, at every step, guided. Even from these scanty elements, the intellectual and moral qualities, the public and private character, of Lord Brougham may easily be estimated. We have only been able to set up, as it were, milestones on his journey, to mark the principal stages which, from time to time, he reached; but even these serve to point to us his unceasing progress, the steady development of his intellectual powers, the gradual augmentation of his knowledge, the silent growth of his energies, the expansion of the sphere of his exertions, and consequently the increase of his influence and usefulness. It is necessary, if we would even tolerably appreciate such a man, that we should have panted after and tasted those waters of literature and science of which Lord Brougham has quaffed so deeply.

No one appears to have been, from his first outset, more strongly impressed with a conviction of the importance of the simple and beautiful advice of Benjamin Franklin,—“O be wise, and let industry walk with thee in the morning, and attend thee until thou reachest the evening hour for rest.” Favoured by no peculiar advantages, except his own natural capacity of intellect and energy of character, he mastered, even in early life, the first principles of moral and physical science, and pursuing his speculations with an exactness and caution which might be profitably imitated by mature philosophers, he fearlessly communicated to the world the result of his inquiries, thus inviting, on the one hand, the detection of error, and

challenging, on the other, an admission of the soundness of his conclusions. Availing himself of all the means of improvement which are inseparable from foreign travel, or could be secured by mingling in the society of many of the higher intellects of the day; gathering information from all sources which were open to him either through personal intercourse with the learned or in the pages of books,—pausing, no doubt, occasionally, in ~~the~~ waywardness of temper,—he commenced a public life of usefulness and fame. The precocity which in most cases rapidly disappears was in that of Lord Brougham the first germ of a plant which was to live, grow, and flourish.

Admitted to the ranks of his chosen profession, he shone rather as an intelligent and intrepid advocate than as a profound lawyer. In England he has been regarded as being acquainted with the law of Scotland precisely, perhaps, as in Scotland he has been considered learned in the law of England. His knowledge of the details of pleading was not accurate, nor could he boast of nice scientific skill; he declined to burden himself with a load of precedents—the spoils, not unfrequently, of many a misspent hour—and accordingly he was no proficient in those minute details of form and practice which, though apparently trivial, are, it must be confessed, within proper limits, essential to the regular and effective administration of any system of jurisprudence. His thoughts turned with more delight to the philosophy of jurisprudence—the principles on which all law ought to be applied to a community—than to an examination of the particular enactments affecting this or that branch of the system, or to an analysis of the decisions out of which the various doctrines may have arisen. He was, by nature and habit, more adapted to the wide course in which he chose to move, than to the comparatively narrow and confined path prescribed to the strictly professional man in Courts of Law: all the tendencies of his mind, as well as the style and tone of his oratory, were more suitable to the former than to the latter sphere of action; for rarely could he attain to the closeness and conciseness of legal reasoning.

To the qualifications of Lord Brougham, as a Judge, presiding in the High Court of Chancery, we have already alluded. It

may be sufficient here to remark that, notwithstanding his great powers and varied attainments, his elevation to the woolsack brought to him, whether sitting as Chancellor in Lincoln's Inn Hall or presiding as Speaker in the House of Lords, no accession of honour: scanty knowledge and still more limited experience in the one capacity, constant want of tact and occasional arrogance in the other, materially impaired his usefulness and marred his fair renown.

It is chiefly by the benefits which he has, as a legislator, conferred upon society, and by his heroic struggles as a statesman, that Lord Brougham cannot fail to be long remembered and revered. Even his most elaborate orations at the Bar were, from want of legal knowledge, in effect neutralized; but in Parliament his speeches, being based on enlarged views of political philosophy and an extensive familiarity with facts, produced a powerful and immediate effect. In Westminster Hall, his addresses were often the thunder without the bolt; but in St. Stephen's Chapel the lightning of his eloquence struck and scorched.

As a legislator, all his operations rested on accumulated information, the result of commissions issued, and witnesses examined. To sudden or hasty legislation he was a sworn enemy; and, rather than accede to the enactment of measures meant only to meet transient emergencies, he was impelled by the activity of his own nature to chalk out schemes which, if not always practicable to the extent which he anticipated, served to occupy a mind to which repose would have been sickness. In all his great schemes he displayed an extraordinary copiousness of resources; and his various materials having been once procured, his constructive faculty enabled him to design and complete vast plans of social and political improvement. The outline of each was first sketched on the tablet of his mind, and then he filled up in detail the various compartments of his design. This is the great distinction between Lord Brougham and the garrulous fraternity which is to be found within the walls of Parliament, the individuals of which are for ever babbling *de omnibus rebus et quibusdam aliis*. Lord Brougham, at no period of his career, ever opened his mouth without speaking

to the purpose and communicating much information, and, generally, sound opinions: he never talked at random; every sentence sprang out of a general principle. It was this wealth of acquired knowledge, as much as his intellectual endowments, which prevented his courage from degenerating into rashness, that enabled him to apply his synthetic grasp of mind to the practical development of his schemes, and to the actual improvement of various public institutions; for, as a legislator, he was eminently practical; every measure originating with him was directed to the removal of some special evil, or the enlargement of some particular good: tangible improvement was uniformly the object which he kept in view, and for the attainment of which he was always ready to sacrifice the merely ornamental. His love of political, as well as philosophical truth, imparted to him an inclination, akin to that which characterized Coleridge, "to creep towards the light, though it drew him away from the more nourishing warmth;" and if it be one of the favourable features of the present century, that the minds of the best and ablest men have ceased to be amused with theories, and have been bent upon the moral and material improvement of society, Lord Brougham, it must be admitted, took the lead in this auspicious march. His unwearied advocacy of the great principles of education, and the amelioration of the legal institutions of the country—his labours for the diffusion of knowledge, freedom, and happiness, among all classes of the people, prove that his motives came from above. The love which he bore to his fellow-men—the interest, above all, which he took in the welfare of the humbler classes, inspired him with a desire that the blessings of knowledge and virtue should become common to the race. And why not awaken into active life sleeping intellectual powers, in the exercise of which we find the sweetest and most enduring of earthly joys? Tiny-hearted and narrow-minded men may distrust the people, and therefore wish to chain their energies; but Lord Brougham knew that ignorance not only cramps and distorts the intellectual faculties, but that the foul demon likewise hardens and chills the human heart. He knew that precisely as generous youth, if suspected, will, at the peril of forfeiting all felicity, escape if possible into a freer,

though perhaps unknown and dreaded element, so the people, especially the people of England, will, if exposed to the degradation of being doomed to grope in mental darkness, flee from the gloomy region, though escape should be effected even through revolt. The genius of Lord Brougham was not selfish or contracted: he wished light and warmth to be shed on all around. He anticipated, amidst his toils, the day when talent, enjoying the fruits of the tree of knowledge which he has planted and cherished, should no longer ~~train~~ her wing only to hover over the throne of prince or mansion of patron, but, in proud self-reliance, win the privileges to which her gifts entitled her.

him

As a politician, Lord Brougham commenced public life in the phalanx of the Whigs. A constitutional Whig, he recognized Charles James Fox to be his master, and such men as Tierney and Romilly to be his fellow-pupils: a Whig of that school he has, through life, continued to be, and in that faith he, no doubt, will die. From the very beginning of his career, he saw no antagonism between conservatism and progress: he considered them parts of one and the same line: he took his position in the centre of that line, and simultaneously enlarged it in both directions; and the equipoise of this balanced line he never wished to disturb. But at no period, however he might choose to lead them, did he allow himself to be the tool of aristocratic Whigs. "Take counsel," says an Arab proverb, "of one greater and of one less than yourself, and afterwards your own opinion." Lord Brougham inverted the process; he began by following his own opinion, and accepted extraneous counsel or admonition with suspicion and reserve. He never could be regarded as a mere partizan: his very nature precluded the possibility of such degradation: the breadth of the basis on which his judgments rested always admitted some elements which either faction was prepared to reject, and to which he was determined to cling. As a bond of union, and consequently a source of strength, among men who had formed independent opinions for themselves, he knew that party-spirit was valuable, although even such leagues must be cautiously formed and narrowly watched, inasmuch as they have a tendency to reduce the great mass of a community to the guidance of a few, and thus to en-

feeble and corrupt the public mind, by discouraging, or rather impairing, all habits of reflection ; but, at the same time, he was fully alive to the necessity of repressing, or at least restraining party feeling, as being a boon to the community at large, by the removal of formidable obstructions which lay in the way of all great objects of wise legislation. The charge of inconsistency, too often alleged against Lord Brougham, is unfounded and unjust : he recently drew nearer to the Conservative peers, not because his political opinions had undergone any change, but because the modern Whigs were forsaking the old traditional path of the party ; and consequently the Marquis of Londonderry and Lord Wynford were forgotten by him, in order that he might assail Viscount Melbourne. Holding firmly, through good report and bad report, his original political creed — a creed comprising the great principles by which all free states are, or, as he thought, ought to be governed, he chose for himself an independent course of action, in the prosecution of which he contemplated the advancement of those doctrines and the adoption of that policy which he deemed essential to the well-being of the whole body politic. To promote this end, he has never swerved from his first views. The wrath of both political parties in the State he has provoked and defied ; by both alternately has he been coaxed and feared, eulogised and abused ; and both have more than once found it convenient to bend to his stubborn will. Every link in his coat of mail may not, perhaps have been true metal : here and there may have been a flaw in its texture or its temper ; but those who charge Lord Brougham with political inconsistency can know but little of the long career which he has run, and nothing at all of those first principles of political science, moulded into such forms as were applicable to the constitutional government of England, with which his mind was deeply imbued, in defence of which his first parliamentary efforts, as we have seen, were made, which he advocated while holding rank among genuine English Whigs, such as Tierney, Romilly, and Horner, and to which he even now, in his old age, clings with all the ardour of his earlier years. With the exception of some changes of opinion, affecting rather the extent and opportuneness of practical details

principles

than general principles, Lord Brougham has been consistent with himself, and by that very consistency he has disappointed and disconcerted parties. He could not submit to passive obedience. While others were groping blindfold amidst the mists of partizanship, he soared into the region of pure patriotism, and in that atmosphere alone he breathed freely and strongly. His earliest efforts were devoted to laying bare, cleansing, and strengthening the foundations of the pillars upon which the English Constitution rests. He could neither be flattered nor frightened into quitting the great highway of limited monarchy. The monarchy he never, even while vindicating popular rights, forsook; and although he believed that the Constitution of England is, in its very nature, elastic, and that danger or destruction is chiefly to be apprehended from violent restraint, from the forcible compression of one part and the unnatural growth of another, or, perhaps, from undue external pressure upon the whole surface, while the continually augmenting powers within are struggling for wider space and freer scope, still the interests of the Crown and of the Peerage entered, as fixed, invariable quantities, into all his calculations respecting alterations in the Constitution. He steadfastly guarded against inroads by democratic insolence upon the other two great elements of the British Constitution. Although no emergency arose to admit of his practically illustrating the noble sentiment which Mr. Wilberforce applied to Pitt, "He stood between the living and the dead, and the plague was stayed," still he had no sympathy with demagogues, or the extremes to which their opinions and measures lead; but within constitutional limits he was liberal and fearless. He spoke plainly: he practised not that taciturn reserve which, by the weak, is mistaken for wisdom: he despised the notion that *omne ignotum pro magnifico habetur*: he threw himself open to attack: *Oser tout dire, oser tout faire*, was, on such occasions, his motto; and, indeed, by this frankness, he was occasionally hurried away so far as to lose sight of the real points in question: he discussed these points, but he mixed up with his argument foreign topics, simply with a view to gratify political passion, or give vent to a particular state of personal feeling. Even in such skirmishes,

however, his resources were inexhaustible: though sometimes defeated, he never retired disgraced. Upon the whole, we doubt whether Lord Brougham, though an enlightened and able politician, possessed the requisites of a Minister of State: he could not have devised, arranged, matured, and fully carried into execution any great scheme of national policy. His proper place was in the ranks of opposition: his habits and temper fitted him rather for sharply watching and criticising the movements of others, than for originating and conducting the policy of a nation; nay, he proved himself to be no successful leader even of a party; he never could command the confidence of all his adherents. At the head of his company, he fought valiantly and skilfully; but as a general officer, tracing out a campaign, he must have failed.

The vehicle in which the thoughts of Lord Brougham were conveyed to a public assembly was never unworthy of the treasures which it bore. The impression produced by any public oration depends much upon the character of the audience and the temper of the times; and in these respects the speeches of Lord Brougham have always been skilfully conceived and executed. But the genius of the really great orator contrives to elevate himself and his hearers above special circumstances, and to throw around his theme a halo which, without obliterating the definite hard lines and features of the facts out of which the occasion arose, preserves it for future ages. In this high attribute Lord Brougham was defective; and his speeches, therefore, we fear, cannot live as specimens of the highest oratory. It is idle to talk of him as a modern Demosthenes. From the very nature of their government, and, above all, from the perfection—the mingling power and mellifluousness of their inimitable language, when contrasted with the stiffness of our hard Saxon, all the Greek orators drew incalculable advantages. Lord Brougham has always been inferior to any one of the three great orators of Greece, for we dismiss Lysias from the list; and yet those who have listened to his living orations could detect in him some of the qualities which were to be found in each. He could, like Æschines, crush an adversary by epithets of hatred or of scorn; but he possessed not that orator's skill in clear and

simple narrative of events. To the rich, sweet harmony of Isocrates, Lord Brougham has no claim whatever. Nor can his most laboured productions be raised to the level of the highly-finished orations of Demosthenes, whose rapidity of style and adaptation of topics and expressions were obviously the result of a profound knowledge of his art. The indwelling genius of these three mighty Greeks pervaded even their epistles. Those of Demosthenes, addressed to his fellow-countrymen, were solemn harangues, in which rebuke was blended with praise: the letters of Isocrates are the compositions of a statesman offering counsel to kings and princes; while those of Æschines breathe through every sentence the thoughts and sentiments of a highly-cultivated mind, and frank, confiding heart—the one having been enlightened and the other cheered by a gentle and joyous philosophy. Some of these attributes Lord Brougham may, to a certain extent, justly claim. In moral courage, for instance, in energy, vehemence, and, we believe, in patriotism, Lord Brougham may be likened to Demosthenes himself; but in no single quality has he reached the height to which each of these orators in his peculiar sphere attained. And who will presume to run a parallel between Lord Brougham and the unrivalled Roman? Cicero surpassed all who had preceded, as he still excels all who have followed him. The highest attributes of the orator, which he possessed in perfection—precision of statement, pleasing elegance of style, matchless tact and address in manner and arrangement, a full and easy command, by turns, of the sublime or the ludicrous—he dignified by a spirit and tone of pure, ennobling philosophy. Lord Brougham, in the British Parliament, has never equalled Demosthenes in the in the Greek Agora, or Cicero in the Roman Senate.

Comparing him with his immediate predecessors, we can ascribe to him neither the wondrous living power of Chatham, nor the sagacity, firmness, and disinterested self-sacrifice of Chatham's peerless son. He possessed not the power of concise, cogent reasoning which characterised Fox: still less has he ever, as statesman or orator, displayed the wisdom and paramount eloquence of Burke, whose political foresight rose almost to the rank of prophetic power; and never from Lord

Brougham's lips have dropped the rich diction and glowing imagery in which the loftiest thoughts and profoundest axioms of political philosophy were by Burke, for the first time, gorgeously enshrined.

Among his cotemporaries Brougham took and maintained a high position. Plunkett, however, equally stern and severe, penetrated more directly and quite as deeply into the principles of constitutional law. Even by Tierney, whose style of speaking was admirably adapted to the House of Commons, he was in condensed vehemence surpassed, although certainly his occasional reckless dash was always preferable to the cold rhetoric of crafty Copley or the frigid proprieties of slippery Peel. But Canning was superior to Lord Brougham in all the essential attributes of the orator. Keeping out of view the advantage which the former enjoyed over the latter in respect of personal bearing, the peculiar style of each may, in some measure, be traced to the influence of education, habits, and associations. The mind of Canning had been, at an early age, devoted to the elegancies of classical literature, while the mind of Brougham had, at the same period of life, been grasping mathematical theorems and the certain truths of physics: the genius of the former, enjoying all the aids of an aristocratic English education, first found admiration among the scions of English nobility and the sons of English gentry; but that of the latter was cherished by him in solitude, within his little chamber in the Old Town of Edinburgh—destined, however, even in boyhood, to catch the eye of the scientific world: the tastes of the one clung to poetry and polite literature; for the other, philosophical investigation and the exact sciences alone had charms. Accordingly, if Canning could in manhood boast of the grace of Apollo, his rival exulted in the strength of Jove.

But though Lord Brougham was surpassed by probably each of the eminent men to whom we have alluded in some one intellectual accomplishment, he had at his command, above them all, more varied weapons, whether for attack or for defence; and in the arsenal of none of them was so plentifully stored destructive ammunition. No one, of course, can by a perusal of the speeches of Lord Brougham, form the faintest idea of the effect

produced by them when delivered. His general style may, no doubt, be gathered from the volumes; for speeches accurately reported are, like books—to use the emphatic language of Milton—"not absolutely dead things, but they contain a progeny of life in them to be as active as the soul whose progeny they are; nay, they do preserve, as in a vial, the purest efficacy and extraction of the living intellect that bred them:" but still, to no modern orator, perhaps, was the personal appearance of the man, with all its peculiar adjuncts, so essential for giving full effect to every sentence which fell from his lips as it was to Lord Brougham. When the lank figure, rather above the middle height, unimproved by attention to external decoration—always excepting the large dangling seals—with sallow countenance, expressive of restless, nay reckless energy, muscle after muscle brought into involuntary play, rose to address the House of Commons, every eye was bent upon it in admiration, dread, or curiosity. He was, however, mentally calm and collected. His intonation was at first low, and the enunciation of each sentence was measured; but, as he warmed, his gesticulation became gradually more violent, until every limb of the frame was in full action, and every feature of the countenance, alive with emotions, was sometimes thrown into strange contortions. But every sentence which dropped from that rude exterior had bone and muscle; let him but be conscious that he was strong, and he was indifferent to comeliness. His matter, too, was well arranged, although his phraseology was cumbersome and without point. Those long disjointed sentences especially, which, when presented to the public in print, without regard to comma or colon—the members being only connected by that most equivocal though convenient hyphen—were in the delivery free from confusion in the conception; the minds of the audience were hurried along with the impetuous utterance of the orator; and at the conclusion the apparently straggling links were all nicely riveted together so easily and so closely, that the entire chain of thought, whether in the form of argument or of illustration, was coherent—at once strong and symmetrical. Not a single thought, phrase, or epithet struck the mind as having been misplaced. Great principles were thrown out with rapidity and

vigour; and if any passage happened to be more florid than his usual style, a spear, as in the thyrsus of the ancients, assuredly lurked within the foliage. If exulting in the calamities which had befallen absolute princes, as being the signs and portents of the ruin which sooner or later awaits despotic sway, he became, as Dr. Parr described Chatham,—“*vehemens, stomachosus*” “*in vituperando acer et acerbus* ;” and the language which the same author applied to Thurlow was not less characteristic of Brougham when assailing a minister of the Crown or a hostile political faction :—“*In adversariis lacerandis furer et bacchari solet* ;” and woe to the luckless wight who, in such moments of withering scorn or proud defiance, presumed to cast his puny form between this intellectual giant and the sun. But as the current of his oratory was generally neither smooth nor calm, so it was not always clear and pellucid. He dashed on with the fury of the cataract—the cataract, too, not without its vapour; for there was in his style but little of that sparkling, pure diction which has been called the *aureum flumen eloquentiæ* : the general impression which it produced upon the mind of the hearer was, as Grattan said of Fox, that of “negligent grandeur.”

And all this stream of reasoning and declamation was poured forth in accents which could alternately swell into a full volume or sink into gentle modulations. No man who has been so fortunate as to listen to Lord Brougham when descanting on some favourite topic, and when all his energies were roused, can have forgotten that voice which, in moments of glowing eloquence, more clear and rich, more sweet and musical, though strong, perhaps than any other which ever brought melody to human ear, soared high above the discordant noises of stormy debate, as if, its office fulfilled, it were re-ascending to its native region, from which, as Prometheus for the benefit of man stole fire from heaven, his genius had for a season woo’d the inspiration down.

No wonder, then, that the sceptre of Lord Brougham has not in vain been swayed over the intellects of more countless, more enlightened, and more devoted subjects than any other public man of the present day could conciliate or command, and that in no preceding period of the history of England have the

masses of the people so willingly submitted to the spell of a potent enchanter.

Nor could the reverses of fortune, which await statesmen and politicians, bring deep or permanent disappointment to Lord Brougham. His resources were so ample and his faculties were, at all times, so completely under the control of his will, that he could without pain or effort pass from one class of intellectual enjoyments to another, and, even when far advanced in life, he faced with delight preliminary discipline as preparatory to his entering upon a new field of philosophical inquiry. To such a man exclusion from power was no penalty; to his tastes and predilections it was probably a boon—a refuge, as it were, far away from the dust of the arena, amidst the verdure of the groves of Academe. Lord Brougham could with tranquillity bear the frown of a monarch, or disdain the smile of a fawning minister, so long as he could withdraw from even the highest offices and associations only that he might hold richer and diviner communion with the august spirits of Bacon, Newton, or Laplace. His love of literature and science runs like a golden thread through the entire tissue of his public and private life; chastening while it elevated his ambition in the one, cheering his spirit and purifying his aims in the other. As a philosopher he had no sympathy with a cold and arid materialism. His wisdom led him far beyond the comparatively dreary region of bare Deism into the warmer and more genial clime of revealed religion. His rigorous and perspicacious mind found no difficulty in embracing that which the prophetic anticipations of Plato's pure spirit¹ foresaw, and which the wise and the good of every succeeding age have delighted to accept and to believe.

It would be absurd to pretend that the finer and higher qualities of Lord Brougham's nature have not been occasionally

¹ *Vide Phædo*, Plat. ed Serr. vol. i. p. 85. While alluding to the insufficiency of human reason, one of the interlocutors remarks, "Unless indeed any one might be enabled to proceed with less liability to failure and danger, as in a more secure vehicle, *by means of some divine communication.*" A still more striking passage to the same effect may be seen in the *Alcibiades* of the same captivating author, ed. Serr. vol. ii. p. 150. His speculations are as sublime as the language in which they are embodied is exquisitely simple and beautiful. How true the remark!—"Plato non hominis ingenio sed quodam Delphico oraculo instructus."

marred and lowered by foibles, by peculiarities, and eccentricities ; and his own severe and penetrating mind has, no doubt, been frequently conscious of its frailties and imperfections ; but his eye has ever, in the main, been looking onward and upward. *Humanum est errare* is an adage as old as the days of Terence.

"Envy doth merit as its shade pursue ;" and Lord Brougham has been often reminded of his failings : those who soar aloft cannot hope to escape unscathed by the lightnings or unruffled by the storms which prevail in exalted regions. But it is pitiful to dwell on the minor imperfections of so great a character : who thinks of counting the dark spots on the plumage of the eagle, while he might admire its flight aloft ? " I have seen," says Addison, " in the works of a modern philosopher, a map of the spots on the sun." The detractors of Lord Brougham are the representatives of those, who, gazing on such spots, worshipped not the glorious luminary. The current, or, speaking more correctly, the gush of his public life has occasionally stolen into some strange creeks and into many a winding bay ; but flow whither it might, every field which it touched was refreshed and gladdened, its verdure was left more vivid, its soil more fertilized, its fruits more wholesome and sweet. We have endeavoured to follow the great body of the stream without pausing to mark all the eddies which it formed as it swept along in its majestic course.

But this is not all. The strong, stern intellectual faculties of Lord Brougham were softened by a frank, generous, and affectionate nature ; so that his indignation, when kindled by party heats, died rapidly away, and even the gall of his sarcasm was not unfrequently mingled with and mellowed by the kindly feelings of his heart. His friendship, constant and sincere, found vent not in empty phrases but in substantial acts of beneficence : and, accordingly, he has with unaffected grace added materially to the comforts of many by favours which his knowledge of passing events and of the state of parties suggested to his mind, and which his personal and political influence enabled him to bestow.

To his simplicity of manners as much as to his solid attain-

ments is he indebted for being the favourite of the social circle. Scarcely have the minds of his companions apprehended his statement of some profound philosophical truth than their fancy is amused by anecdote, by a stroke of pungent wit or broad humour. The horror with which he recoils from stiff, pedantic affectation is so strong that he has sometimes been betrayed into bluntness of manner and of speech.

The flatterers who would raise Lord Brougham to the level of Bacon¹ or Newton² can be only very superficially acquainted with the intellectual grasp of these greatest of sages, who stand unparalleled in respect of philosophic inventive genius; the one in mental and moral science, the other in physical inquiry. They created the instruments and formulæ by means of which their wondrous triumphs were achieved; and each in his sphere "dwells like a star apart." But the genius of Brougham caught the rays which came streaming from these two great orbs of light: he is one of the worthiest living and loving sons of these fathers of philosophy, one of the most sincere, cheerful, and enlightened votaries of these "priests of nature." Let his name be engraved within an humbler though not less hallowed temple. When the whispers of personal jealousies have been hushed, and the jarring sounds of party-spirit have died away, the name of Henry, Lord Brougham and Vaux—the affectionate relative and the steadfast friend, the ardent energetic orator, the fearless advocate, and independent unpurchaseable statesman, the scholar, the philosopher, the patriot, and the philanthropist—cannot fail to be remembered and revered; and, above all, he may rest assured that, transmitting to posterity a civil renown as imperishable as the language in which his genius gave form

¹ "Ingenium et largo procurrens flumine linguæ,
Philosophi pariter Juridicique decus."

² The reader, no doubt, recalls the exquisite lines of one of Lord Brougham's early friends, Thomas Campbell:—

So Newton, Priest of Nature, shines afar,
Scans the wide world and numbers every star:
Wilt thou with him mysterious rites apply,
And watch the shrine with wonder-beaming eye?
Yes! thou shalt mark with magic art profound
The speed of light, the circling march of sound."
et cetera, et cetera.

to thought, or as the national institutions which he has throughout a long and eminently useful life laboured to beautify and perpetuate, the children of future generations shall throng to greet in fancy his unforgotten shade, and, bowing down with grateful hearts, shall offer willing homage at his shrine.

ART. V.—THE TRANSMISSION OF THE
EXECUTORSHIP.

THE office of an executor, as our readers are aware, is not personal merely, but, by operation of law, is transmissible to his own executor, and through him to others, in one undying chain of obligation, with no limitation or end but such as the infraction of technical rules shall occasion. This principle of law imposes upon third parties the assumption and performance of the trusts of testators to whose persons they have been perfect strangers, and whose wishes and directions they would probably never have undertaken if they had had the choice of a refusal. In the usual course of things a man's office dies with him, whether he be a postman or a prime-minister, and the executorship alone furnishes an exception to this salutary and reasonable rule.

The text-books, while they state the principle of law, do not trouble themselves to explain upon what foundation it is based, or to illustrate either its practical bearing or its theoretical worth. They do not comment upon its hardship, or expose its absurdity. Even Swinburne, whose racy old English style reflects an honest heart, and sterling good sense, does no more than caution his readers against the dangers which they may incur in so simple an act as taking probate. This continued neglect is the more surprising, when we find that though many salutary innovations in testamentary law and its practice have been constantly proposed, this startling piece of mediæval juris-

prudence seems doomed to be ever overlooked.¹ We, however, are not such rigid legal conservatives as to desire to observe the same silence ; for we think that the subject is one of such grave importance as to deserve, in a very high degree, that attention which it has hitherto so unaccountably escaped. To make ourselves as intelligible as we may wish in our following observations, we shall be compelled to go back to an early epoch, and to commence at that period in the history of Roman Law when the word "executor" was legally unknown.

This now all-important word is pronounced by Lord Hardwicke, in the plenitude of his learning, to be a "barbarous term ;" and so it may be, if the state of a language is never to be changed, or if new expressions are never to arise to symbolize new facts and phases of life and its occupations. But although a quarrel about the beauty of a word is generally trivial, there may arise occasionally, even in mere verbal disquisitions, questions of weight and interest, if the endeavour be made with labour and sincerity to trace historically the conditions under which an expression has been formed, as they have gradually and successively evolved themselves into the maturity of a distinct and novel institution. Under such circumstances, the history of a small word may be the history of a great fact, and of a revolution in the public mind and habits. And thus, while we apparently gain only a lesson in philology, we may, in reality, have demonstrated the objects and the limits of an institution. This will be our warrant for the ensuing prolixity. We will apply this method to the treatment of the word "executor," hoping to show, in the result, that *rite et recte*, historically and logically, the transmissibility with which he is gifted or encumbered forms no just portion of his true office and its duties.

The testamentary executor, as we now have him, was unknown to the Roman Law so long as it continued to be uninfluenced by Christianity. The administration of a testator's property, such as in our days is conducted by the executor,

¹ Since writing the above, an esteemed friend has informed us that some years since Lord Campbell, whose wonderful acumen no absurdity can escape, proposed to bring in some bill to remedy the evil above pointed out.

in the palmy state of that law was committed to an institution wholly and absolutely distinct.

In accordance with this peculiar institution, a testator could only leave his property to one or more persons, whom the law denominated his *heres* or *heredes*; but to soften this absurdity, he was allowed, under certain formalities, to *condemn* the *heres* or *heredes* to pay to other persons such legacies as he chose to bequeath; and this liberty, by the beginning of the Empire, was further increased, and a testator was enabled to bequeath his property (but still the whole of it) to his *heres*, upon condition that he *restored* either the whole or a part of it to one or more persons: this latter was the *heres fiduciarius*.¹

In this institution, it is easy to see that there is no *executor*. Here is only a person having a beneficial interest in the deceased's estate, and deriving his authority to administer it from that beneficial interest; for even in the case of the *heres fiduciarius*, the law gave him a right to a certain portion of the estate, notwithstanding it purported to be all given away in trust; and in the case where the testator had exhausted his estate in legacies, the *heres* could compel the legatees to refund to the extent of a portion also fixed by law.

In the *heres*, therefore, resided the general administration of the estate; but he could receive a limitation of his powers and his functions, as well as a restriction of his beneficial interest, if the testator so willed it.

By the Roman law, a testator could commission and direct a person, purely disinterested in a pecuniary point of view, to do a certain act connected with his last wishes, or to receive a sum for the same purpose, distinctly and independently of the *heres*. This act would be one in which the testator's feelings of piety, of local patriotism, or of egotistic ostentation, would be engaged; and it would therefore be one in which he would distrust the avarice of his *heres*; and he would accordingly select an esteemed and unselfish friend or a public official for the purpose, according as the act itself would suggest the eligibility of the one or the other. This person, whom the Roman law styled a *minister*, and described as *nudus*, would exact the fund from

¹ De Fresquet's *Traité Élémentaire du Droit Romain*. Paris, 1855.

the *hæres*, and would execute the required act without his interference or control.¹

Hère, therefore, was an executor for a limited purpose, and his institution was unquestionably a defalcation from the power and functions of the *hæres*.

This principle of law would have seemed sufficient for all the purposes of charity, at least as they were understood in an age when the place of an effete religion had been supplied by stoicism in the upper classes, and despair in the lower. But in practice, such legacies were often failures, through the formal rigour of the law; for it was necessary to their validity, that the *minister* should be named, as well as that the act should be enjoined and the sum of money defined. If no such person was named, the *hæres* was under no obligation to do the required act, or to pay the money to any person for the purpose. There was no *executor* of the trust, and the legacy was void for that want. No one could claim the job of right; there was no extemporized trustee, who could demand payment of the money *eo nomine*; and the heir was in pocket *pro tanto*.² This might do for Pagan times. As charity towards the poor was not one of the virtues of those religionists—as their temples and their services were supported and defrayed from the public purse, the special purposes for which a testator could leave a bequest were unimportant or even trivial.³ The cupidity of heirs did not interfere with a general principle, and its indulgence would not therefore rouse public indignation and disgust. But when Christianity had spread its root in men's minds, and the Church, true to the great task imposed upon her by her divine Founder, had formed her grand scheme of reconstituting society upon the Christian basis, by bridging over the gulf between the rich and the poor, so far as community of feeling and corresponding acts of charity could effect it, the special purposes for which Roman testators could devote their funds became sanctified in their nature, and

¹ The disinterested character of the *minister* is illustrated in the Digest, lib. xxxi. tit. 2, p. 17: "Si quis Titio decem legaverit, et rogaverit ut ea restituat Mævio, Mæviusque fuerit mortuus, Titii commodo cedit."

² Cod. de Episc. et Cler. i. tit. 3, p. 28; Digest, lib. xxxiii. tit. 1, p. 7.

³ The instances given in the Digest, are a *monimentum* and *imagines*—mere vain-glory.

enlarged in their range and extent; they became vast as they became prospective. But testators would forget or be ignorant of these requisite formalities of the law; the objects of their bounty and piety would be disappointed and defeated, and the Church had often to deplore loss to its own members and the poor, through the imperfection of the law and the carelessness of testators.

So long as the law supported this principle, to the promotion of the selfish interests of the *hæres*, so long was the Church retarded and obstructed in her great and comprehensive schemes; for the *hæres* thus stood in the way of the principle of practical charity and philanthropy; and whilst he existed, captives might groan through a prolonged captivity; the poor would endure a hopeless eternity of poverty; learning would sigh over lost opportunities for its extension, or fear a total eclipse.

But by the time of Justinian, Christianity had so influenced the law that the Emperor repealed the obnoxious principle,¹ and substituted the bishop, though unnamed and undesignated, as the *executor* or *minister* of all charitable trusts and purposes.

This was much, but it was also suggestive of more. Why should it not become the point from which a circle should be drawn to comprehend the whole estate? It acted well for a limited purpose, why should it not act better for a general one? The importance of this *ministerium* to carry out the regenerating plans of the Church which supplied the place of the Poor-law, was evident to her and to her subjects; and an increase of power in the *minister* commensurate to the objects to which the Christian theory saw that it was applicable, was desired by all. But how could it be effected without a revolution of law? for, according as you extended the powers of this *minister*, you would reduce those of the *hæres*, a name which all the lovers of Roman antiquity must have revered.

By the Roman law there could be no will unless there was a *hæres*. He was *caput et fundamentum testamenti*,² and without him all legacies were void. The Church must therefore endure

¹ *Ante*, in note. Cod. de Episc. et Cler. i. tit. 3, p. 28.

² De Fresquet, vol. i. p. 345. "A l'époque des Jurisconsultes classiques l'institution d'héritier était la base de tout le testament."

him until, in the fulness of time, she could induce the ruling powers to abrogate him, or at least to reduce him to the inferior rank of residuary legatee, subject to the power and control of a general or universal executor, such as the latter now exists. But before this was done, an intermediate stage in the downward journey of the *heres* had to intervene. Justinian deprived him of all his beneficial interest in an estate, i. e. his *falcidia*, where legacies had absorbed the assets.¹ This new principle of law struck a blow at the heart of the *heres*, while the other principle, though it weakened his power, had eased his position, by relieving him from the execution of specific trusts, though compelling him to become in one sense subsidiary to their *ministri*, by paying them the sums or legacies required by their offices. But he was hitherto left free to collect the *substantia*, or assets, and to retain either the residue or the *falcidia*, which was substituted for it. But in wills *ad pias causas*, he was now annihilated, and his vocation was gone. Under such wills he had nothing to perform, as the trusts were *ministeria* confided to others to execute; and as his authority to collect and administer an estate depended solely upon his beneficial interest in it, when the one was removed, the other was tacitly repealed also; for in the theory of Roman law, the *heres* was *emptor familie*,—the owner of the testator's property, purchased by him under a fictitious sale, which the forms of the testament long continued to symbolize. As his office was gone, the sacramental name of the *heres* was no longer necessary to give operation and validity to these wills, and the testator was free (as he was compelled by a feeling of necessity) to appoint a general executor, who would collect and administer the estate, and hand over the funds to the various *ministri*, or himself gather up the scattered trusts into one hand and a single management. It is true that this innovation only legally applied to wills *ad pias causas*. In all others the *heres* must have remained rampant as ever.

But how long he so remained unsuperseded we are unable to say, only so much we know for certain, that by the time of the Emperor Leo (A.D. 905 to 911),² it was a *fait accompli* in the

¹ Justin. Nov. cxxxi. cap. 12, and Cod. lib. i. tit. 3, p. 49.

² The promulgation of the Basilics lies between these dates.—De Fresquet,

East, and we may therefore conclude that it was so in the West also.¹ The heir was by that time degraded or mediatized, and the general executor was paramount. It was good for the world that this obstacle to Christian piety and philanthropy was removed. If it had persisted, the cathedrals of Europe would not have been built; its abbeys and convents would not have been founded; its colleges and universities would have been the dream of an enthusiast, and the piety and learning which they severally fostered and spread would have been dwarfed or have totally perished.

When, precisely, the general executor was extended to wills for secular purposes we do not pretend to know, and there is no historical evidence to give us a hint. It is, in fact, parcel of the history of the *officialates*,² which has to be written even in France. But the power of analogy over men's minds must have vindicated its usual irresistible sway, and testators intentionally or in ignorance would begin to appoint persons as the general executors of their wills; until the law became tacitly revolutionized in this respect, as it did become in others; for long before the age of Justinian, the mere historical and sacramental forms of the Roman law were rapidly disappearing under the enlightening influence of Christianity.³

Introduction, p. 34. The Emperor Leo, Const. 68, refers to executors in clear and intelligible terms. He says (we quote the Latin translation for want of a better): "Sed hos etiam, quibus testatores bonâ illorum existimatione moti, testamentarias de rebus suis præscriptiones committunt, ac post mortem eorum executionem concredunt, tutores vocare cœperunt," &c. This quotation seems to have been unknown to a learned writer in the Penny Cyclopædia, who, *sub voce* Executor, gives his reader less than a pennyworth of learning. He says: "The executor answers in some degree to *hæres designatus* [what is that?] or testamentarius in the Civil Law, as to the debts, goods, and chattels of his testator; but the origin of executors seems to be properly traceable to a constitution of Manuel Comnenus, *περι διοικητων, και των διαθηκων*, A.D. 1143 and 1180."

¹ The Constitutions of Justinian and his successors had no legal authority over the West; but there is at the same time no doubt that there many or most of them were repromulgated and made law, or adopted without formality. M. Troplong (p. 328) observes: "Quant à l'occident, auquel les lois de Justinien ne s'adressaient pas, les mœurs y faisaient d'elles-mêmes ce que la législation n'avait pas opéré."

² This remark is made in a very interesting article, in the *Revue Historique du Droit Français et Etranger* (tom. i. liv. i.), by M. Laboulaye, the professor of comparative legislation at the Collège de France.

³ See the charming work of M. Troplong: *De l'Influence du Christianisme sur le Droit civil des Romains* (Paris, 1855).

The executor had to undergo another phase before he could attain his maturity, for when we are enabled to track him to his last development, we find him existing as much the creation of the ordinary as of the testator who had nominated him. He had then as now no title independent of the court, but must sue from that not only the authentication of his will, but also his right of administering the estate, without which latter his testamentary title was mere verbiage, a nugatory flourish conferring of itself no legitimate functions whatever.¹ This state of law, which now also exists, could not have arisen until the *audientia episcopalis* or consistory had added the testamentary jurisdiction in common and in solemn form to its powers. When precisely this occurred we know not. We only know that Justinian jealously repelled the episcopal encroachment of the insinuation of testaments in his time,² and that therefore its legal ratification must have been in a later generation. But the executor did eventually, as we all know, become subject to the consistory. He was compellable by that judicature to pay legacies and to render accounts. The Church long regarded him as its own peculiar servant.

In all these preceding facts we can see nothing but the creation of a new kind of trustee, required by the moral changes and the influences which Christianity had introduced through the inculcation of practical charity, and the organized care of the poor and the miserable, as a religious obligation,—ideas utterly unknown to Paganism; and whether we view the executorship as derived from the testator, or of the bishop, the aspect is still the same—the executor, as such, is a trustee only.

But how is it, then, that the executor must impose upon his own executor the obligation of performing any untouched outstanding trust of his testator? This does not arise *primâ facie* as a just consequence from the executorship, whether we consi-

¹ How this arose is not clear; but it was in respect of this that the Canonists styled the bishop "*executor legitimus*." The bishop undoubtedly had a power of managing, or seeing to the management and performance of legacies *ad pias causas*, not only where there was no *persona designata*, but in general cases where there was such, and even where there was a *haeres*. *Vide* Justinian's Nov. cxxxi. tit. 11 & 12; and Cod. lib. i. tit. 3, p. 46.

² Cod. lib. vi. tit 23, p. 18.

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der it in its original object and creation, or in its mediæval phase. The explanation would seem to be historical only, not logical.

When the Church had destroyed the *hæres*, and had set up the executor, her lawyers busied themselves to find analogies between the two. One analogy was obvious,—both of them had the management of the general estate. The executor was therefore *loco hæredis*.¹ If he intermeddled, he should be under an obligation to complete the administration, and not at will divest himself of it. But here all true analogy ceased, as our readers have seen from our previous remarks. The canonists, however, thought not: they proceeded further, and they fearlessly applied to the executorship, without logic or pity, the principle of the *transmissio hæreditatis*, which they found in such texts of the civil law as the following:—

“In omni successione, qui ei hæres extitit, qui Titio hæres fuit, Titio quoque hæres videtur esse, nec potest Titii omittere hæreditatem.”²

“Ex antiquâ regulâ quæ voluit hæredem hæredis testatoris esse hæredem.”³

“Hæredis appellatio non solum ad proximum hæredem, sed et ad ultiores refertur; nam et hæredis hæres, et deinceps hæredis appellatione continetur.”⁴

This transmission of the inheritance is just and natural, for it means no more than the vesting of a beneficial interest in property, whether the *hæres* or a legatee took it,⁵ and is therefore no more than such a legitimate consequence of property as every age and clime beyond the savage state has recognised. But whilst property is clearly transmissible to a man's representatives, office is as clearly personal and untransmissible. After the *hæres*, however, was dead and harmless, the Church dressed up the executor in his garments and decorated him

¹ So Lyndewode calls him, cap. Statutum, verb. Intestatis. But Mr. Justice Blackstone (Treatise of Equity, book iv. part 2), in a style of reasoning since adopted by the clowns at Astley's, observes, “The executor is like the *hæres* in the Civil Law, only he takes nothing to his own use.”

² Dig. lib. xxix. tit. 2, p. 7.

⁴ Dig. lib. l. tit. 16, p. 65.

³ Cod. lib. vi. tit. 24, p. 14.

⁵ De Fresquet, vol. i. p. 415.

with his properties, and as she had her own way in those days, she finally pronounced the executor and the *hæres* to be one and the same, and undistinguishable; a doctrine which is devoutly believed in the present age. We have said enough, we think, to show that the transmission of the executorship is no true element of it, whether we regard the office as derived from the testator or the ordinary, but is an intrusive and adventitious addition, highly condemnable on grounds of public policy and a just attention to private interests. We think that this mischievous perversion of law should now be repealed; for as a principle, it is contradicted by its history, and is unsupported by its *rationale*.

H. C. C.

ART. VI.—SKETCHES OF THE IRISH BAR, &c. &c.

By W. H. CURRAN, Esq. 2 vols. 8vo. London, 1855. H. Colburn.

IN our last number appeared a brief notice of some of the more prominent characteristics of the Irish bar, as displayed in Mr. Sheil's Sketches. A few more pages may, perhaps profitably, if not amusingly, be set aside for a continuation of the same subject in connection with the Sketches of Mr. Curran, which treat of persons who were contemporaries at the bar with the former-named author, and with the originals of his portraitures. This work, however, though containing various passages of vigorous and striking delineation, does by no means present the highly-finished pictures that Mr. Sheil's pencil gave us: the colouring is less rich and less varied, the accessories are fewer and less carefully elaborated, the light and shadows are managed with less skill; and besides this, very nearly one-half of the book is occupied with matters having no relation whatever to bar or barristers, judges or juries. A lengthened memoir of Chief Baron Woulfe stands first in the gallery, and when compared with some of the full-lengths that

follow, will be found, we think, most strikingly to illustrate the disadvantage at which an intended likeness is taken from memory, as compared with the almost self-evident truthfulness of air which belongs to the traits and touches that a master of his art catches and dashes in when painting from the living subject. Though written by an early friend and life-long companion, yet, being written within these few months for the purpose of the above-named publication, and long since the decease of the Chief Baron, this sketch is far less racy of the Irish soil—savouring far less of the *reality*, as it strikes us, than do many of the “counterfeit presentments” which follow, and which first appeared when the originals were in full life, and were unconsciously exhibiting in the Four Courts, and in society day by day, their attitudes, studied or natural, their habits of thought and action, their modes of address, their forms of speech, “the rest of their acts and all that they did,” to be then and there chronicled and delivered to the public and posterity.

Stephen Woulfe, of a Roman Catholic family, was born in 1786, and after graduating at Trinity College, Dublin, was called to the Irish bar in Trinity Term, 1814. In the long vacation of the next year he travelled on the Continent, “through France into Geneva, Switzerland, Italy,” as he expresses himself, in one of his letters, taking the Tyrol on his way home. He says, “I think you might travel from Paris to Geneva for seven napoleons, from Geneva to Milan for seven more, and to Venice for three:” and this is nearly all that he seems to have had to communicate to his friend of his impressions during his tour, although in the course of it he had seen probably as many cities as the wise Ulysses in his rambles. A year or two after this his frame began to exhibit the harassing symptoms of feeble organization, taking sometimes the form of tendency to disease of the lungs, and then of other maladies with one or other of which he had to contend for the rest of his days. Nevertheless, in 1819, he is found plunging into the midst of “the Catholic controversy,” in a pamphlet which won him the countenance of Plunkett and the praise of Burke, and which Lord Grenville pronounced to be, “in his opinion, the ablest piece of political writing that had appeared

since the days of Burke." Probably most readers would incline to consider this comparison as involving a somewhat exaggerated estimate of the performance; this at least is clear—its author enjoyed the advantage of writing at an interesting crisis of a national question with which his historical studies and his social connections alike tended to familiarize him. Matters had been gradually brought to the point of resting objections to the Catholic claims on one principal ground. The moment they were fully emancipated, or at least whenever they, as Mr. Secretary Peel, in stating the objection, expressed it, "became the preponderating body in Ireland," they were, it seemed, "to endeavour to strip the Established Church of her political supremacy and restore their own to the splendour she anciently enjoyed." Woulfe attacked this position with more than one weapon, but chiefly confining himself to long trains of argument, both theological and political, supported by instances derived from history as well ancient and modern as contemporary; and on the whole, as above hinted, we suspect the reader, who refers to this *brochure*, to see what was the description of writing that might bring a man into notice forty years ago, will discover more of zeal than of power, and may reckon the writer not a little fortunate in having fallen on times of excitement, in the ardour of which many become passionate admirers of any exponent of their own views who can be said to overtop, by ever so little, the rest of the rank and file of the party. Read in these days, the pamphlet certainly seems to wear a wearily elaborate air, and withal otherwise to resemble Burke in the handling of the subject as little as well can be, unless perhaps in the propensity it exhibits to say a plain thing *not* in a plain way. However, the pamphlet, as it turned out, was adapted to the tastes of the moment, and did its author some service socially, and much, very much, forensically. He had never been, we are told, "in the ordinary phrase, a severe student, but he had read the leading elementary works of modern date upon law and equity, and the new editions of older works of authority with modern annotations. These he had studied and may be said to have mastered;"—an amusingly vague and gingerly-phrased statement to be made by an early and confi-

dential intimate, of the basis of erudition on which was finally to rest fitness for the chief seat in one of the Supreme Courts of Ireland: such a statement being much more what one would expect to read concerning the acquisitions of the law student, who was "content to dwell in decencies for ever," as a stipendiary magistrate or assistant barrister, by no means even in the loftiest of his day dreams, lifting his eye towards the elevation of the ermined bench. However, as time wore on and practice did not flow in, although the bar would not have been the profession of Woulfe's choice, and he had anything but a natural relish for the technicalities of law, yet he probably must have found relief, as many a briefless barrister has done before him, from present *ennui* and blankness of prospect, by plunging deep in its shady abstruseness, as if thus to hide himself, as it were, from the frowning reality of life, and the sense of his slow progress in the path he had taken. Possibly Mr. Curran's materials for the following animated description of a junior barrister may be derived from what he saw of Woulfe or knew of others like him then at the foot of the awful hill, and scarcely making from one year's end to the other sensible advance in the ascent.

"I now planned a course of study, in which I made a solemn vow to myself to persevere. Besides attending the courts and taking notes of the proceedings, I studied at home at an average of — hours a day. I never looked into any but a law book. Even a newspaper I seldom took up. Everything that could touch my feelings or my imagination I excluded from my thoughts, as inimical to the habits of mind I now was anxious to acquire. * * * * *

I now deplored the sinister ambition that had propelled me into a scene for which, in spite of all my self-love, I began to suspect that I was utterly unfitted. I recalled the bright prospects under which I had entered life, and passed in review the various modes in which I might have turned my resources to honourable and profitable account. The contrast was fraught with anguish and mortification. As I daily returned from the courts, scarcely able to drag my wearied limbs along, but still attempting to look as alert and cheerful as if my success was certain, I

frequently came across some of my college contemporaries. Such meetings always gave me pain. Some of them were rising in the army, others in the Church; others, by a well-timed exercise of their talents, were acquiring a fair portion of pecuniary competence and literary fame. They all seemed happy and thriving, contented with themselves and with all around them; while here was I, wearing myself down to a phantom in a dreary, profitless pursuit; the best years of my youth already gone, absolutely gone for nothing, and the prospect overshadowed by a deeper gloom with every step that I advanced."

With Woulfe, however, things by and by began to brighten, although we are told, rather singularly, he was "without any predominant aptitude for the practical details of the Profession." From the time of his beginning to get publicly known, his reputation veered a-head of his practice, an impression being created of his powers being adequate to greater matters than as yet he had been engaged in. Feeling strongly the repulsiveness of the the law as a study in its then condition, and the advantage of sweeping away some of the cobwebs of centuries that were then untouched, in the eighth year from his call he took in hand and had nearly finished for publication, a digest of his views respecting the amendment of the laws of real property, intended for publication in the pages of the *New Monthly Magazine*, in which had the year before appeared a review by him of Godwin's work on population. But this performance never saw the light; the then conductor of the *New Monthly Magazine*, Campbell, the poet, declined the subject, as being unsuited to his readers; the author hesitated to publish separately unless he could get "a fair price for it;" and the consequence was, that four years later he found in Mr. Humphrey's "Observations on the actual State of the English Laws of Real Property, &c." his own ground seized and built upon. But this was of the less importance, as he had already obtained more direct and fruitful means for bringing his name into favourable notice with the patrons of the junior bar, in the appointment of prosecuting counsel for the Munster circuit, conferred by Mr. Plunket in his second attorney-generalship, with an income fluctuating between 700*l.* and 1,000*l.* a year, and duties in no way inter-

fering with the recipient's "ordinary professional pursuits." Moreover, the elevation to such a position in those times, gave him the stamp, so valuable to a Roman Catholic, of official approbation. A little before he had married an heiress with a considerable fortune, having himself some independent income, so that he may be now considered as landed an early prosperous man, with a right to but one-half the sentiment of the old lines, originally an epitaph, which Lord Brougham was reported in the autumn of 1853 to have had inscribed over his door at Cannes:—

"Inveni portum : spes et fortuna valet,
Sat me ludistis ; ludite nunc alios."

But this ease was of the purse only ; he was soon found to be subject to an unnamed organic affection, which defied surgery to discover its precise nature. Nevertheless he increased in connections and wealth, making a friend of the late Lord Melbourne during his short tenure of office as chief secretary to the Lord Lieutenant of Ireland, and receiving from the present Lord Ellesmere (the succeeding secretary) the appointment of assistant barrister of Galway, with an income of 900*l.* a year. Next we find Lord Anglesey, on coming over in 1831 as Lord Lieutenant for the second time, immediately causing Mr. Woulfe to be introduced to him, at once appreciating his merits, and setting his name down for further government promotion. Now, all this certainly reads very much as the abstract or skeleton of a novel ; for it is to be observed we are left wholly in the dark as to the extent of this fortunate man's professional practice up to this period, much less is any trace given by his biographer of any, even the least, prominent achievements, or successes, or triumphs, by way of entitling him to so rapid an advancement. To his political pamphlet, well-timed and useful to his party, he appears to have solely owed, as yet, all that he had acquired in the line of legal reward. In 1832 he was obliged to resign the assistant-barristership on account of his maladies, which long journeys aggravated. In 1833, being then of the ripe age of forty-six, we find the first note of triumph sounded. He greatly distinguished himself, it is said, in a Crown prosecution arising out of the popular resistance to the payment of tithes, where, as

counsel for the Crown, his address to the jury in reply to O'Connell (who had made a deep impression, we are told), was of such power as to secure a conviction. It is proper, nevertheless, to read this in connection with the fact of the Crown having given evidence *clearly establishing the prisoner's guilt*. Woulfe was immediately made king's counsel by Lord Plunket, at the instance of the Lord-Lieutenant. In 1835 he was made a Serjeant, next year Solicitor-general, in 1838 Chief Baron, thus rapidly attaining an office which at that time was the most exacting of due qualification of any judicial position in Ireland, because the Exchequer had for some time previously been the favourite court with solicitors for the institution of civil proceedings, and in consequence, besides the vast mass of causes which were to be disposed of by the Court sitting *in banco* during term, the long list of cases to be tried at the *Nisi Prius* sittings after term, formed the peculiar province of the Chief Baron. There were, in addition, the duties of the two regular circuits. All this was too much for his feeble health, and in the close of 1839 he obtained leave of absence from Ireland for a year, with the understanding that if by the end of it his health were not re-established, he should resign. An anecdote is related by his biographer, by which it appears that, at the time of this transaction, the Chief Baron of Ireland was positively unaware of the statute regulating the salaries and retiring pensions of the judges, under which, as in England, on resignation from confirmed bodily ailment they became entitled to the same pension as on retirement after fifteen years' service. But death shortly after put an end to his sad sufferings, being hastened by the consequences of an operation performed at Baden Baden.

Now, putting aside for a moment the consideration of the deplorable termination of this career, in the prime of life as regards years, though in its decadence from infirmity of constitution, it is certainly not easy to discern adequate grounds for so splendid and rapid an elevation. The simple fact seems to have been, that Woulfe's lot was cast just at the point of time when his standing in point of years in the profession, joined to his respectability of character and social position and connections, pointed him out at the period when it became the policy

to advance Roman Catholics to office, as a safe object for such promotion. Fortune was obviously much his friend; for, born some ten or a dozen years earlier, he must have died without a taste of the emoluments which he actually shared, and without the lustre of having filled high judicial office that now belongs to his name. Such a life is certainly of the class which strongly tempts to agreement with the poet's conclusion; for in contemplating it one can hardly fail, running though it be into some exaggeration,—

"To deem there's scarce a one in dangerous times
Who wins the race of glory, but than him
A thousand men more gloriously endowed
Have fallen upon the course; a thousand others
Have had their fortunes foundered by a chance."

Appended to the above sketch, Mr. Curran prints some notes of conversations which he had with Chief Justice Bushe, during a three days' visit at the Chief's family place of Kilmurry in the county of Kilkenny, in the autumn of 1826. Of these fragments it may be said, that being specimens of the conversational powers of a man who was reputed to be singularly gifted in that respect, they will be read with avidity, but probably with more interest than satisfaction on that score. They contain, however, some amusing anecdotes of some celebrated Englishmen, as well as of several Irish notorieties. In the following remark, Bushe has hit, we suspect, the secret of the popularity which Boswell's *Life of Johnson* has so long maintained: "It was to him," he said, "the most delightful of books: first, because he found everything in it so charming in itself; and, next, because he no sooner finished it than he forgot it all, and so could return to it *toties quoties*, and be sure to find it all as charming as before and almost as new." Bushe occupied some hours during the early part of the day in preparing certain judgments against the ensuing term. In reference to his researches for this purpose, he says, "I was working this morning at a judgment of Lord Coke's, reported in *Bulstrode*. *It took me two hours to discover its meaning*. I would rather have sat down to as much Greek. All the difficulty arose from the absurd mystery of the style. The moment I caught the reasoning, I, without any trouble, condensed the whole into six or

eight lines." Here is a passable *mot* by Chief Baron O'Grady. Some persons were questioning, at Plunket's table, Lord Castlereagh's sincerity on the Catholic question. Plunket warmly defended him, saying that on that subject he had lately made a great deal of character for himself. "He has," said the Chief Baron; "and, depend upon it, he'll lose no time in spending it all like a gentleman." The following is told in proof of Curran's extraordinary retentiveness of memory: "I," said Bushe, "once casually observed to him that I thought it a common error to suppose that men did not know their own characters. Twenty years afterwards, he said to me, 'I quite agree with you in one observation I remember to have heard you make. The truth is, every man knows his real character; but, as he has come by his knowledge of it confidentially, he makes it a point of honour not to admit the fact—even to himself.'" An anecdote is recounted respecting what is termed Lord Mansfield's "gallantry in his youth," consisting of a detection of him by his wife in an act of adultery, for which, we believe, there is no other authority whatever. Grattan, it seems, as Erskine is known to have done, made the speeches in "Paradise Lost" his chief subjects of rhetorical study. Grattan is to be added to the number of those who persuade themselves they have discovered the author of "Junius" in Burke, wilfully overlooking the extreme improbability of any sane man's engaging in an undertaking which, if discovered, would have been the certain ruin of all his hopes and prospects with his party, to whose principles those of "Junius" are, in many vital points, wholly opposed, and that, too, at the very time when he (Burke) was publishing pamphlets and making speeches in support of the Rockingham Whigs, being, in truth, the soul and main reliance of their body. The charge, in fact, implies that he was writing down his own interests anonymously; whilst he was writing them up ostensibly, and surely therefore is quite idle and inadmissible.

The rest of the sketches may be dismissed at once, as depicting persons whose fame, for the most part, never reached much beyond the shores of their native isle, and who, even there, only occupied a moderate share of professional eminence—*for-*

temque Gyan, fortemque Cloanthum. To this there are two exceptions—Lord Plunket, of whom the memoir seems to us well worthy of preservation, being, we believe, the fullest and most elaborate record of what he was and had been up to 1822, whilst still at the bar, that is to be found of that illustrious and highly-celebrated man—and Mr. O'Connell, whilst also a practising barrister, in the 48th year of his age, and before he had fallen on the evil days of the *rint* and mischievous agitation, unvaried by the production of a single specific measure for the remedy of the evils he spent his latter years at once in denouncing and aggravating. Saving some excellent touches of delineation in the matters of personal demeanour, gesture, and peculiarity, which are true to the life, it must, we think, be pronounced of this sketch of O'Connell, that it falls below its subject, seeing that he had already attained, at the time it was taken, the position of by far the most remarkable man at the Irish Bar, being then in the three-and-twentieth year of his career. For the reason above intimated, our readers will not desire, we apprehend, that we should place before them any of the details of this portraiture, especially as—unlike the case of Woulfe, who, in fact, was as unlike O'Connell in most points as one barrister can be unlike another—this account of him has been long before the public; whilst quite as little, if not less, can be derived from the consideration of it for professional purposes, whether of imitation or study. Looking at O'Connell, however, as a whole, and considering his wonderful power with Irish juries, his wide practice while at the Bar, and his enormous practical power over his countrymen in general after he left the Bar, as evinced by the number of members his *fiat* returned to the Imperial Parliament, his sway over those most wonderful civil phenomena of our times, the monster meetings; and remembering his influence with the Governments of his day, his talents, his singularities, contradictions, foibles, and follies—we may be allowed to express a hope that the life of such a man may be properly written by some one, or by several acting in conjunction, who have known him while living. It will not be disputed that by such persons only can such a life be properly written, whilst early anecdotes and traditions, and

later facts, may be supposed not yet to have faded away; and we trust it will be done in such a style that the next generation and all posterity may not be left without an adequate record of one of, perhaps, the most eloquent and able and successful lawyers, and certainly the most multifarious and voluminous public speaker and most powerful politician, not invested with office, that Ireland ever produced.

ART. VII.—THE COUNTY COURTS COMMISSION.

First Report of the Commissioners appointed to inquire into the State of the County Courts, and the course of Practice therein, &c.

HAVING advocated the establishment of local courts in this country long antecedent to the date of the original County Courts Act (9 & 10 Vict. c. 95), having watched with much interest the great experiment in legislation which during the preceding nine years has been in progress, having always entertained a conviction, despite the sneers of those whose interests possibly were adverse, that the theory of “bringing home justice to a man’s threshold” might, to some considerable extent at all events, successfully be reduced to practice, we avail ourselves of the very first opportunity which presents itself of calling attention to the recently issued Report of the County Court Commissioners, of discussing its suggestions, analysing, so far as may here be practicable,¹ the evidence contained in it—indicating what we conceive to be its shortcomings, and supplying its deficiencies.

That the principle on which County Courts were originally established is sound we never doubted—the principle is that of affording to the poor man a means of “righting” himself by proceedings at

¹ The remarks offered in the present paper will be found to apply exclusively to those portions of the Report of the Commissioners which concern the jurisdiction of the County Courts.

once "simple, cheap, speedy, and *final*." "The object," remark the Commissioners,¹ "which the Legislature had in view when it established the County Court evidently was to secure to the public the benefit of a local tribunal in which claims of a moderate amount, and not complicated in their nature, might be enforced with cheapness and rapidity." That the principle thus expounded has worked well we may assume from the same testimony,² which says that during the period which has elapsed since the establishment of local courts, "*the experiment has been eminently successful*, and benefits have been conferred on the community by means of those courts which it is perhaps difficult to exaggerate. Honest claims have been enforced, and injuries have been redressed which the expense, distance, and delay incident to the proceedings of the Superior Courts placed in effect beyond the power of the law. *Facility to enforce rights has checked the commission of wrongs, and thus a more desirable state of credit and morality has been produced.*" The preceding allegation is so important that it behoves us to inquire somewhat as to the evidence on which it may be founded. Turning then to page 77 of the Appendix to the Report before us, we find the following observations of Mr. Furner, judge of the Sussex district of County Courts, pertinent to the point in question:—

"The moral influence," says this witness, "of the County Court has been such, that it has very much improved the condition of the agricultural labourers. They used formerly to get hopelessly in debt to the country shopkeepers, and, being reckless of the consequences, they spent their money on the Saturday night at the public-house; but now, I am told, and I believe it is the fact, that the agricultural labourers, being emancipated from the thralldom in which they were held by the shopkeepers before, take their money home to their wives, who go with that money in their hands to the shops, and get much better served, and in every way more advantageously to the family. In fact, that result is so fully confirmed, that I am told the country brewers begin to complain of it. I have heard as a fact, that the brewers in the country complain that the agricultural labourers do not spend so much money at the beershops as they used to do; and I have no doubt that it is in a great measure to be attributed to the moral influence of the County Courts."

That much odium has unduly been brought upon our local Courts by the unfortunate selection which has in some instances

¹ Report, p. 25.

² Id. *ibid*.

been made of judges to preside over them, but especially by the want of discrimination which characterised the original appointment of these judges, that the strong common sense inherent in the community has too frequently been alarmed and scandalized by displays of want of knowledge and want of temper, to which it might be deemed invidious here more specifically to advert, are facts patent to the public, which it would be folly, or something worse, to blink or to deny. Notwithstanding, however, the grievous errors which have been thus committed—errors which can in no spirit of fairness be viewed as inseparable from the *system* of which we speak,—it may, we think, be justly assumed that the establishment of County Courts has thus far, *on the whole*, been productive of much good. The *pros* and *cons* in reference to their efficiency are concisely stated by the learned Commissioners in their Report¹ before us in these terms :—

“In the County Courts, the absence of any pre-appointed means of separating questions of law from those of fact, the non-employment generally of legal advocates, the non-attendance of a Bar, the rapidity of the proceedings, and the power of the judge finally to decide on all questions of law and fact, except where the claim exceeds 20*l.* in amount, render the judgment of the Court less secure against miscarriage. On the other hand, *the County Court is near to the residence of the suitors, and the proceedings are simple, cheap, speedy, and final.*”

Assuming, then, that the principle on which local Small Debt Courts are advocated is really sound, the question at once presents itself,—Within what limits are such Courts to exercise exclusive jurisdiction? What is to be deemed a “*small*” debt, and to be summarily recoverable as such? This word “small” as applied to a *debt* is manifestly relative only, and we agree with the Commissioners, that “it may be conveniently treated for the purposes of jurisdiction as embracing claims not exceeding 20*l.*”² We should indeed have thought that a like limit in lieu of the present (5*l.*), would have been advisable in actions of tort, and that very many actions of trover, trespass, or on the case in which damages within the higher limit might be recoverable, would be conveniently and in fitting manner disposed

¹ Page 24.

² See also, as to this point, the evidence of Mr. Pollock, judge of the Liverpool County Court (Report, App. p. 120).

of by the County Courts.¹ Upon this point the evidence adduced before the Commissioners is indeed somewhat conflicting; but should their suggestion in favour of rendering removable from the County Court on special grounds a suit there instituted for an amount below 5*l.* be adopted by the Legislature, we cannot divine what objection there can be to giving to the local courts a more extended jurisdiction than they at present possess in actions founded upon tort.

"As a general rule," observe the Commissioners at pp. 29, 30 of their Report, "the amount of the claim is a convenient test of the importance of the question to be determined, and therefore it is generally desirable that where a claim does not exceed 5*l.* the cause should be irremovable. But it occasionally happens that questions of great difficulty both of law and fact arise in cases where the amount in dispute does not exceed 5*l.* Thus, questions of fact occur where the claims belong to a class each of which individually is of less amount than 5*l.*, but which being questions of fact, cannot, as the law now stands, be raised before a superior tribunal. Thus, in actions by several workmen against a contractor, or by several passengers on a railway, or by several customers of a common carrier, where in each case the demand does not exceed 5*l.*, although the question is of considerable importance, and in effect brings into litigation an aggregate amount far beyond 5*l.*, no means exist at present of removing such actions into the Superior Court. Again, difficult questions of law, other than those which are excluded from the jurisdiction of the Court, may arise, or such questions may be so mixed with questions of fact as not to be conveniently separated, and yet the amount in dispute may not exceed 5*l.*"

Now it seems to us that if the power of removal thus suggested be granted to a defendant in the County Court, no objection can successfully be urged against extending the exclusive jurisdiction of that tribunal in matters of tort to the amount (20*l.*) which it exercises in regard to rights of action *ex contractu*.

The main question, however, transcending all others in importance, which arises in connection with local courts as at present established, is this:—Should or should not their "*concurrent*" jurisdiction be extended, first, as regards amount, where the claim is for a "debt, damage, or demand;" secondly,

¹ In favour of the view above expressed, see Report, App. 71; in opposition to it, see *Id.* p. 137.

as regards the subject-matter of the suit—as where the title to realty comes in question?

As regards amount—the Commissioners do not suggest that any extension of jurisdiction should be made save “that if the sum claimed be a balance alleged to be due, not exceeding 50*l.* after making allowance for a set-off, if the claim and counter-claim do not respectively exceed 200*l.* the case ought to be within the concurrent jurisdiction.” Now, we confess to having long entertained an opinion—the correctness of which we have from time to time endeavoured in various ways to test—in unison with those who think that the jurisdiction of the County Court, in respect of any “debt, damage, or demand,” should *very materially be extended*; and although we should hardly be prepared to acquiesce in the view propounded by the judge of the Liverpool County Court,¹ that a plaintiff should have the power of suing before the inferior tribunal *for any amount whatever* for which he might be advised to resort to it, we nevertheless think, that the concurrent jurisdiction of this tribunal might, with great benefit to the public, be made to embrace claims much larger in amount than those of which it can at present (unless by consent of parties) take cognizance.

“I am quite certain, at present,” says the learned judge just named, “that a great number of actions, principally connected with mercantile affairs, are not tried solely because there is no tribunal to which ready access can be had; as, for instance, a ship comes into Liverpool to-day, a cause of action arises within the following fortnight or a month either by or against the captain; the only witnesses who could support that claim, or meet it if brought, are persons connected with the vessel; they are in Liverpool and in this country but for a very short period of time; they perhaps never return; the cause of action existing, and a debt being undoubtedly due, the man to whom that debt is due never can bring an action to recover it, because he has not the opportunity at present of having recourse to a tribunal inexpensive and close at hand; his witnesses are gone, and the remedy is lost for ever. I have reason to know that that occurs almost every day in Liverpool, and has occurred almost every day, I believe, for many months or years.”

The great risk of a failure of justice above indicated as likely to be continually incurred in large commercial seaports, or even in manufacturing towns, may, under the present system, thus

¹ Report, App. p. 120.

be obviated, where the debt sought to be recovered does not exceed 50*l.*—a special application is made to the judge of the local court to bring on the particular case, out of its regular turn, at the earliest possible day; that application being acceded to, and the parties being thus brought into court, the action is tried, the debt is recovered, and “the witnesses separate and *never could be got together again.*” Let us take, on the other hand, a case in which the debt claimed greatly exceeds the present statutory limit of jurisdiction of the County Court—the plaintiff is then compelled to wait perhaps six months for the assizes; but long before their arrival, the witnesses who could support his case are separated, wide, may be, as the poles asunder, “*and never can be got together again.*” The consequence of this defective state of the system of administering justice is, “that merchants continually submit to losses for which they have a clear right to be indemnified, solely because they cannot go and try their case at once, and because they can never obtain by any possibility the opportunity of trying it anywhere at any other time.”¹

In any case of peculiar urgency, such as that at which the above remarks are levelled, we would suggest that a County Court judge should, on the production of proper affidavits, or even on an oral *ex parte* statement of the claimant, have a discretionary power to entertain the case, quite irrespective of the amount sought to be recovered; but that if judgment be given at the hearing in favour of the plaintiff, it should be competent to the defendant, on paying into court or giving security for the amount of the judgment debt and costs, to appeal upon any question of law to a superior court. It seems to us that the exercise of a very moderate amount of caution and discretion by the local judge would readily frustrate any attempt which might be made, improperly to give jurisdiction to his court in respect of matters not within its ordinary cognizance. Nor does it appear to us that the plan here suggested would, in practice, be likely to operate at all harshly towards a defendant who could, of course, if so minded, obtain the verdict of a jury in the infe-

¹ See the evidence of Mr. Joseph Pollock, judge of the Liverpool County Court (Report, App. p. 122).

rior court upon questions of *fact*, and the judgment of one of the courts at Westminster in regard to any question of *law* which might arise at the trial.

It will be distinctly understood that our proposal (which we respectfully press upon the attention of the legislature) to confer upon the County Courts an extraordinary jurisdiction, unlimited as regards the *amount* of the claim to be investigated, is meant to apply solely to the class of cases already sufficiently indicated, and as illustrative of which the following apt instance is given in the evidence of the Liverpool County Court judge, contained in the Report which gives occasion to this article :—

“Two or three weeks since,” says the witness in question,¹ “an application was made before me, on a Friday, for a summons returnable on Saturday, which is the only day, at present, on which I do not sit ; I declined, therefore, to entertain the summons, but I offered to grant it returnable on Monday morning, the first thing. They acted upon that permission ; but on the Saturday afternoon the man had left, and the debt was lost. If I had been sitting on the Saturday morning, the debt would have been recovered.”

The broad questions, however, yet remain for consideration, What should be the limit, as regards pecuniary amount, of the concurrent jurisdiction of the County Court under *ordinary* circumstances? Should it have any and, if so, what jurisdiction where the title to land is brought in question?

Now, the leading arguments, so far as we can collect them, urged in favour of restricting the jurisdiction of the County Court within its present limits are as follow :—The object to be effected by the establishment of County Courts was, as already stated, in the words of the commissioners, at p. 131 of this article, to secure to the public the benefit of a cheap and prompt adjustment of claims accruing to them, such claims being of a moderate amount and not complicated in their nature. The County Court was meant to be emphatically the “poor man’s court,” the tribunal to which he might resort without fear of finding himself exposed to delays there in consequence of the competing claims of wealthy suitors and the right to pre-audience asserted by such professional advocates as might be engaged by them. It is said, indeed, and probably with truth,

¹ Report, App. p. 122.

that if the time of the County Court judges were further occupied by casting upon them the task of adjudicating upon claims much exceeding in amount those which at present come before them, the amount of business in arrear must rapidly and prodigiously be augmented, and that the machinery erected for the administering of local justice would eventually be brought to a stand-still.

That there is some considerable force in the objections just stated, we willingly admit; that they altogether dispose of the question (which has much occupied the mind as well of the public as of the profession) in regard to the policy and expediency of extending the jurisdiction of the County Courts, we utterly deny. That the objections aforesaid, or some objections analogous thereto, have much weighed with the commissioners, we cannot reasonably doubt; for their recommendations touching the matter before us are but scanty and restricted. They propose (first) that where the amount claimed in the County Court falls within its present concurrent jurisdiction, *i. e.*, where it exceeds 5*l.* in tort and 20*l.* in contract, but does not exceed 50*l.*, the defendant should be permitted to express his dissent from the plaintiff's choice of tribunal, and should be permitted to try in the superior court, without assigning any reason for so doing, on giving satisfactory proof that his objection is not for the purpose of delay—in other words, on giving security for the amount claimed and costs in the superior court, or on making a deposit to the like amount, the costs in the court below being treated as costs in the cause. The commissioners propose (secondly) that where the sum claimed in the County Court is a balance alleged to be due not exceeding 50*l.*, after making allowance for a set-off, provided the claim and counter-claim do not respectively exceed 200*l.*, the case should be within the concurrent jurisdiction of the superior and inferior courts. They propose (thirdly) that the concurrent jurisdiction of the County Court should be extended to actions of malicious prosecution; and (fourthly) that when in an action brought in the superior court it appears that a sum not exceeding 50*l.* is claimed in an action of contract, or that the claim is reduced by set-off, payment, or otherwise, to a sum not exceeding 50*l.*,

a judge shall be empowered to direct, on the application of either party, and on such terms as he shall think fit, that the cause shall be heard in a County Court.

Of the first of the foregoing suggestions, we confess that we cannot, with every feeling of respect for the commissioners, bring ourselves cordially to approve; we fear that, if adopted, it will operate in practice to *increase litigation*, and to subserve unworthy ends. We think that the great desideratum in connection with local courts is the attainment of justice *there*—is promptitude in the adjustment of differences—is finality; and we cannot very clearly recognize, in the suggestion to which we are now adverting, a desire to effectuate these objects. Of the second of the propositions above enumerated we unhesitatingly approve; and of the last we will merely say, that it appears to be excellent in tendency, though we entertain considerable doubt whether it will so work as to throw much business into the County Court. We should have been better pleased if, in lieu of the proposals aforesaid actually made by the commissioners, some moderate extension in the jurisdiction of the local courts had been recommended by them, together with (if necessary, as we think it would have been) some corresponding increase in the number of the County Court judges. To our apprehension, a limit of 100*l.* for the concurrent jurisdiction of the inferior court would not be excessive, its exclusive jurisdiction in regard to matters of contract ranging, as at present, up to 20*l.*, and extending to a like amount in tort, instead of being circumscribed as regards cases of this latter class within the very narrow boundary of 5*l.*

The next suggestion of the commissioners to which we would advert, has reference to cases in which the title to realty, &c., comes in question within the meaning of the 58th sec. of the stat. 9 & 10 Vict. c. 95; where any such question arises incidentally to the claim which it is the immediate object of the action to enforce, it is proposed that jurisdiction may be conferred *by consent of parties* on the presiding judge, and that when jurisdiction is thus given, his decision shall be binding on the parties so far as the immediate question in dispute is concerned, but shall not be evidence of title between the litigating parties or

persons claiming by, through, or under them in any other proceeding. The mode in which this suggestion of the commissioners would work, if adopted by the legislature, is thus illustrated:—An action may be brought for the value of a tree, which it is alleged that the defendant has wrongfully cut down: the defence may be that the tree was growing on the defendant's own land. The question of title to the freehold then becomes a question incidentally arising in the cause, but which must be decided in order to dispose of the claim. So in an action for rent, if the tenancy under the plaintiff be denied, a question of title to the tenement may arise. And in either of these cases, both parties may be quite willing that the judge of the County Court should decide between them, as by virtue of the proposed amendment he would accordingly be authorized to do. We think that the suggestion here made by the learned commissioners is a very useful one, and trust that it may be carried out. It will be remarked, however, that no proposition is made in this Report for giving jurisdiction to the local court in ejectment generally, or where the immediate object of the suit there brought is to recover something which the proviso contained in the 58th sec. of the 9 & 10 Vict. c. 95, enacts shall not be within the jurisdiction of the court—as, for instance, where the claim is for tolls, or the action is brought for the recovery of a tenement not within the meaning of the 122nd section of the statute just named. In respect of any claim of this latter kind, the commissioners propose, indeed, somewhat to restrict the jurisdiction of the County Court, limiting it to those cases only where the amount of the annual rent *and* annual value do not exceed 50*l.*, in lieu of allowing it, as at present, to take cognizance of cases where the value of the premises, *or* the rent payable in respect of the tenancy, does not exceed the sum in question. The nature of the change thus suggested will be at once apparent on referring to the clause of the County Courts Act above specified, and to the decision of the Courts of Exchequer and Queen's Bench in *The Earl of Harrington v. Ramsay* (8 Exch. 879, S.C. 2 Ell. & Bl. 669).

Assuming that the modification thus proposed by the Commissioners is adopted, they think that the jurisdiction of the

County Court may usefully be extended to cases "where one half-year's rent is in arrear, and the landlord or lessor has right by law to re-enter for non-payment thereof, but no sufficient distress has been left on the premises to countervail such rent; and also to the case of mortgages where the money lent does not exceed 100*l.*, and the mortgagee is entitled to obtain possession." In the latter case, the judge of the County Court having power to postpone granting a warrant of possession for any period which he might deem fit, and being invested with the same powers as may be exercised by the Court in pursuance of sec. 219 of the Common Law Procedure Act, 1852, in actions of ejectment between mortgagee and mortgagor.

We are aware that much difference of opinion exists in regard to the expediency of conferring on the County Court jurisdiction where the title to any corporeal or incorporeal hereditament comes in question, and, on the whole—bearing in mind, too, that ere long we shall have an additional circuit in the year, giving increased facility to the suitor—we think that the balance preponderates in favour of the view taken of this important subject in the Report before us, the true nature of the arguments adducible against the extension adverted to is very clearly exhibited by Mr. Adolphus, judge of the Marylebone Court, in his evidence given before the commissioners. That learned gentleman thinks that the change in question is at all events premature, for these reasons:—

"I question much if the County Court system is yet ripe for such an enlargement of jurisdiction, and for dealing with the vast questions which it would sometimes introduce. I will not say that a County Court judge ought to be afraid of having to entertain such cases, and of course he would bend his best exertions to this duty if required of him. But the alteration would open the County Courts not only to disputes between individuals, upon questions of right more or less simple, as of boundary or watercourse, but to others, affecting great numbers of persons, as of franchise, custom, and public right of way, which sometimes raise the most difficult points in the law, and which parties would often require to have tried by juries; and I cannot help doubting whether the County Courts, with the pressure which many of them now have upon their time from their ordinary business, and with the limited professional assistance they receive under the present system from attorneys or counsel, are in a situation fairly to meet these difficulties. The proposed altera-

tion gives to the County Courts a share of the nicest and most arduous practice that now devolves upon any judge of a superior court at the sittings or assizes. If it were introduced, there must, at all events, be a great deal more latitude given to appeal; at present there is no appeal to the Superior Courts, except on a wrong determination of the case in point of law, or an improper admission or exclusion of evidence."

Mr. Furner also says¹ that the giving to the County Court jurisdiction where the title comes in question, would not be convenient, because it would tend very much to destroy the utility of the court for the recovery of small debts. "*It would,*" he remarks, "*occupy so much time if we were to try titles.*"

As regards jurisdiction *by consent*, the commissioners suggest that it may expediently be extended so as to embrace all questions, whether of law or of fact, of which the Courts of Common Law have cognisance, except claims for damages in respect of alleged criminal conversation. It is sufficiently obvious, indeed, that a claim of this latter description ought not to be made the subject of a proceeding by consent, as such a proceeding might be mischievously used, with the ulterior object of obtaining a divorce, in which the interests of the wife might, in her absence, be collusively sacrificed (Rep. p. 27). The commissioners think, however, that the provisions of the statute 13 & 14 Vict. c. 61, s. 17, as to the mode in which the consent of parties is required to be given (viz. by a memorandum in writing, signed by the parties or their attorneys, which is to be filed with the clerk of the Court), should continue operative.

We have now noticed *seriatim* the *more important* of the suggestions put forth by the County Court Commissioners, having reference solely to the jurisdiction of those local courts, as to which they were appointed to inquire. The remarks which we have yet to offer upon other points mooted in their Report—especially as to the right of appeal from the inferior to a superior court—will appear so soon as may be feasible hereafter. We would, however, lose no time in pressing earnestly upon the commissioners the desirableness—we would even say the urgent necessity—of effecting a consolidation of the various

¹ Report, App. p. 71.

statutes and parts of statutes bearing upon the constitution, jurisdiction, and practice of the County Courts. Should this matter, however, not be deemed, by the learned persons to whom we address ourselves, as falling within the scope or wording of the commission under which they act, then would we beseech our legislators when next their attention is directed to the working of the Acts in question, with a view to their amendment, to favour the community at large—so many of whom are deeply interested in obtaining readily a knowledge of the rights and remedies enforceable in the “Poor Man’s Court”—with one clearly worded and intelligible enactment (repealing all prior legislation having reference to the matters whereto it relates), that shall give him the information which he needs.

ART. VIII.—THE LAW OF THE CONSTRUCTION OF WILLS.

FEW branches of real property law have given rise to more multifarious decisions than this. The reason is that the construction of wills necessarily calls into action the various mental idiosyncracies of the judges who have at different times laid down dicta, rather than principles, for the guidance of their successors. That which appears sufficiently to express a definite meaning to one mind, by no means conveys it clearly to the apprehension of another; and so it has come to pass that general principles of construction have not been always found to be of certain application.

A host of decisions are now on record, and the task suggests itself to us to give as nearly as the case admits a statement of the present law, as it applies to each branch and division of obscurity in wills. Our labour will be somewhat diminished in this work by the keen-sighted treatise recently written by

Mr. Arthur Parsons on the subject,¹ though it by no means exhausts it.

"*Verba intentioni*" has always been the great canon of construction, and the usual question in each case is what the intention was. There are, however, certain rules which in a great measure aid us in ascertaining this, but still there is no branch of law which requires that we should pay more attention to the cases which have been decided upon it. We propose to consider them under certain distinct heads.

ESTATE.

"Generally speaking," says Lord Mansfield, "no common person has the slightest idea of any difference between giving a horse and a quantity of land." Common sense alone would never teach a man the difference, but the distinction which is now clearly established is this:—If the words of the testator denote only a description of the specific estate or land devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of interest or property that the testator has in the lands devised, then the whole extent of such his interest passes by the gift to the "devisee." What were such words as denoted the *quantum* of interest, and not merely the corpus or designation of the property, formed, and still forms, the subject of investigation in all ambiguously worded wills, made before the passing of 1 Vict. c. 26, of which sec. 28 dispenses with words of limitation where real estates pass, and gives the fee simple without them, unless a contrary intention plainly appears.

The word *estate* has a technical meaning, and supposing it to be used alone, it was always held to pass the fee simple even before the passing of the Act. Where it is employed in the operative clause of the devise, it matters not that it serves another purpose, and also designates the property itself, as in these words, "all my estates, lands, &c., known and called by the name of the Coal Yard," &c. (*Roe d. Child v. Wright*, 7

¹ A Treatise on the Law of Wills, with an Appendix, containing the Succession Duty Act. By Arthur Parsons, Attorney-at-Law. Simpkin and Marshall, London.

East, 259). Also in *Gardner v. Harding*, 2 Moore, 565, the words used were "my estate, consisting of thirty acres of land," &c. In *Doe d. Pottow v. Fricker*, 6 Exch. 510, the words were "I give H., *my estate* that I now live in, to my son," &c. In both these cases and several others, it was held that the words "my estate," had the effect of "all the estate that I have in Blackacre," &c. It is obvious to every one who misleads himself by a reference solely to the grammatical construction of sentences and the plain acceptation of English terms, that thus collocated, the words "my estate" mean no such thing; but simply indicate the property itself, and not the interest, which the testator intended to pass in it. For example, he would use the same words in precisely the same sense if he intended, and even if he expressed his intention, to give a life estate, thus:—"I give and devise my estate, called Blackacre, to my son A. B. for the term of his natural life, and after, &c., to C. D." In all these sentences the word 'estate' has plainly, in common acceptation, to do with locality, and not with interest. But law has little relation to common acceptations, and has long since attached a magic to the term 'estate;' and so far has this been carried in the last case, of *Burton v. White*, 22 Law J. Exch. 129, that the courts now dispense with the word "my," which was thought to some extent (though assuredly to a very small one) to imply an interest, as well as indicate a place. But in this case there was no possessive pronoun used. The words were, "I give and *bequeath* to my son, J. W., all *that farm or estate* I bought of Mr. B., of London, containing &c., situate at Q. &c., and in the occupation of myself," &c. Now, although these identical words in the same will had been previously construed by the same judges in the same Court to carry only a life estate (*vide* 17 Law J. Exch. 327), in vain did Mr. Phipson now argue that these words could not be construed into a devise of the fee, the word "estate" being clearly used as a synonym for "farm," and indicative only of the locality of the property: the words not being "all *my* estate," but "all that farm or estate." The Court dwelt on the technical meaning of the word "estate," and Mr. Baron Parke laid it down broadly—and he it noted that this is the law on the subject—that "the

word 'estate' is sufficient to pass the whole interest a testator has in the subject matter, unless it be controlled by the words in the will, which *require* it to be considered as merely descriptive of the corpus of the property disposed of by the testator." Thus there is no possibility of the word estate creeping into a devise without passing the fee, so long as it is unaccompanied by words which restrict it to a lesser interest. In the former case of *Doe d. Burton v. White*, 17 Law J. Exch. 327, it had been argued in vain that the after words in the same will, namely, "I give and bequeath the rents or interests, &c., shall go to the person I have left the estates and properties respectively to," were explanatory of an intention in the operative clause of the testator's meaning in using the words "farm or *estate*," and showed he intended all his interest therein to pass. In the later decision it was so held without recourse to this auxiliary clause at all! It may, however, be safely laid down that the operative clause determines the interest which passes under it. *Randel v. Tuchin*, 6 Taunt. 410, and many other cases have decided that where the operative clause does not pass a fee, no words elsewhere introduced can. Since the passing of 7 Wm. 4 and 1 Vict. c. 26, where words of inheritance are unnecessary, even without the magic word 'estate' in order to pass the fee, "I give Blackacre to John Smith," carries the fee without more words, and not merely a life interest, as it would have done before the passing of that Act.

REAL ESTATE.

It is often difficult to distinguish when real estate passes, where no real property is specifically named. The last case sufficiently illustrates this, and shows how such wills are to be construed. The testator bequeathed his property thus: "I give, *bequeath*, and dispose of all estate, effects, and property whatsoever and wheresoever, which I am now or shall be possessed, or over which I have any right or power of disposition, unto," &c. (trustees.)¹ The sole question being whether this passed the real estate of which the testator died possessed, the Court had recourse to the context, to discover the intention of the testator, as laid down in *Woollam v. Kenworthy*, 9 Ves. 137,

which decides that the whole scope of the will should be looked to; and also *Church v. Mundy*, 15 Ves. 396, which throws us on that ordinary sense of the terms used, which in construing the word estate, as we have seen, the Court of Exchequer sets aside. Here the testator had used the terms "principal," "shares," "legacies," "interest," "bequeath" (never "heirs" or "devise"), all of them applicable to personalty only, and not to realty. Then, again, he had directed the trustees, their executors and administrators, to stand possessed of the property, charging legacies upon it. All this showed that the testator had personal estate only in his mind when he made this will. Similarly in the case of *Stokes v. Salomons*, real estate was held to be in the testator's mind: inasmuch as he had disposed of a life interest in one to his son, he proceeds to give, bequeath, and *devise*, in the event of his death, "all my aforesaid estates and effects." This was held to contemplate realty; and consequently copyhold property, *subsequently acquired*, passed under the will.

Unless the contrary clearly appears, wills take effect, and pass all property in possession of the testator at the time, not of the making of the will, but at his decease.

The liberal interpretation put by Courts of Equity and Law on the intention of testators who use general terms in devising their property, is perhaps most of all manifest in the construction put on devises of reversions. Ever since the time of Lord Hardwicke, it has been settled law that a general devise, or rather a devise of a reversion in general terms, passed the fee, and not the mere life estate. It has also been long ago decided, that the reversion *cum fee* passes even where it is not named, but where such words are used as "all my lands not before devised," although a life estate has been given in them to A. B. Of course reversionary interests expectant on estates tail go by the same rule, however remote; and as the only question is, what did the testator intend, and as great latitude is given in construing the non-legal expressions he may use, it requires very desperate blundering, and excessive inadvertency, to baffle the generous desire of the Courts to open the net wide enough to impute all kinds of reversionary interests to the mind of the testator. It is not in the least necessary that he should correctly

state the limitations consistently with the possible events on which the reversion may fall into his possession. He is allowed a license of blundering to such an extent, that, in one instance, a reversionary estate was held to pass under a will, in which the testator expressly declared that he had no interest! (*Doe d. Howell v. Thomas*, 1 Scott's N. R. 360.) Here he actually possessed a disposing power over the reversion in fee of certain estates, limited to his sons in strict settlement; though fully believing he had no such power, he said so in his will. It is therefore quite immaterial that the testator had no such intention in his mind when he made his will, where the words used are large enough to pass the property, and he really has a disposing power over it. Where his language is ambiguous, and there is other property to which the limitations are applicable, still in such cases, if it be possible to extend the scope of the words used so as to embrace a reversion, however remote, it is done, as was amply decided in *Mostyn v. Champneys*, 1 Scott's N. R. 293, where the reversion in fee was expectant on an estate tail of which the testator was tenant-in-tail; but it was held that, having used the words "estates, whatsoever and wheresoever, over which he had any disposing power," they carried reversionary estates as well, though he had them not in his contemplation at the time.

Another class of cases is well illustrated by the decision of Lord Eldon, in that of *Church v. Mundy*, 12 Vesey, 427, where the testator, having a reversion in fee expectant on an estate tail in his brother, devised all his real and personal estate to B. for her life, and on her death to his said brother and his heirs; but in the event of his death before B., then to B. absolutely, and at her disposal. Lord Eldon decided, that the reversion passed, notwithstanding that the property passed according to the limitations was only such as B. might first enjoy during her life, and which the brother might take after her death; whereas the reversionary estate in question could not fall within these conditions, and could come to B. only after the death of the brother and his heirs. But Lord Eldon laid it down, and certainly in accordance with common sense, that inasmuch as the testator had no other real estate to which the limitations could apply, and he clearly had a disposing power

over the reversion, it was better to give the fullest scope to the words used, "all my real estate," than to supply the deficiency by conjecture.

It seems, therefore, that where there are no express words which carry the fee in reversion, the Courts will import from the context the probable intention of the testator to give that effect; and that where there are express words, broad enough to include the reversion, it will pass without the testator's intention at all; so strong is the inclination to give the largest possible construction to wills, and to extend the net to its utmost possible limit.

In a similar spirit, it is not necessary in order to an estate tail, that it should be created by the proper words of inheritance, so long as they can be implied from the context. The explanation of latent ambiguities is also conducted on the same principle. In *Bervosconi v. Atkinson*, 17 Jur. 128, where Sir J. Page Wood, V.C., held that "intestacy was the very last resort which the Court will be driven to adopt," extrinsic evidence was admitted to show the person who was the legatee, it being uncertain whom the testator meant, owing to a latent ambiguity; and this is not unusual, but of established usage. Even where there are two perfectly irreconcilable and repugnant dispositions of property, the Court is nowise at a loss, and settles the matter by giving effect to whichever stands last. General are preferred also to specific legacies. (7 Hare, 382.)

The case of *Butt v. Thomas* (the latest decided, and reported in the *Law Times* of June 30) affords a further illustration of the construction of wills, as regards estates for life, or in fee, or in tail.

The descent of vested remainders has also been the subject of conflicting decisions and complex law. One of the latest cases decided in connection therewith being *Shum v. Hobbs* (24 Law Journ. Chan. 377).

There are many other branches of the law, having reference to the construction of wills, which open up subjects of much importance, and on which light may be thrown by further investigation and analysis: to these we shall probably recur in a future paper.

ART. IX.—THE STATUTE LAW COMMISSION.
OUR LEGISLATIVE SEBASTOPOL.

THIS is the great mystery of the day—a great mystery in the sense of a great work—and in the sense of a great secret.

In the former sense, it might solve many difficulties, both in political and in legal statesmanship. Administrative reform it might relieve of half its difficulties; and in like manner, by placing the law in the simplest state practicable, facilitate legal education of the future members of the profession; give us advocates no longer devoted to one or two corners of the field of law, and judges, both in our local and general courts, who shall be masters of the principles and practice of jurisprudence; and, finally, by the illustration which our law in action would receive from the publicity of the tribunals by means of the press, a people conversant with law in its higher as well as its ordinary relations and effects.

So many wonderful things have happened in our time, that we would fain hope this consummation, withheld from us for 800 years and more, may finally be vouchsafed to some among us living at this period.

Our great difficulty is the mystery of the proceedings of the Commission. Discussions have taken place among its members, and a course has been marked out, but nobody knows what it is; and so it is shut out from that wholesome discussion by which public opinion is formed, and brought to aid useful public undertakings, while distrust, like a mist, hangs over the operation, and it is thought to be a job and a failure.

One cannot visit either House of Parliament without witnessing scenes which make one yearn for the fruit of the labours of the commission. Bills, or embryo statutes, are introduced, in disregard of the law, in disregard of the labours of the same legislative body at the same time, and in disregard of the objects and uses of the very persons and authorities for whom they are

intended ; and some thirty or forty measures are night after night struggling for a hearing, till at last the House, worn out with much importunity, passes them, without having a discussion at all, the weary member having watched and waited many a day, being called away by other avocations, or fairly exhausted. This is a serious matter, not to be vindicated by the plea that men's minds are occupied with war. If war be so engrossing, let provision be made for the other cases which will not await a return of peace.

In the present case, we have to some extent that provision in the Statute Law Commission ; and it requires but such a business-like and frank dealing with the powers which that commission enjoys, to earn for it a position and a usefulness that will make it one of the best and most dignified institutions that we have. Let it but ascertain the law as it is, and thus give the basis of operation for the legislature in its proper work. The history of the commission, its circumstances, and its manner of action, so mysterious and reserved, have not only not allowed it to acquire credit and influence, but have deprived it of the prestige which it would have enjoyed.

Of this there is abundant evidence in the proceedings of the House of Parliament in the present session. In the House of Lords, where the greater number of its most distinguished members are to be found, a marked, even sullen silence barely broken : in the Commons, one or two divisions, in one of which the Government were signally beaten, and in the other nearly so, although three Cabinet Ministers had spoken earnestly, and at large, upon the matter.

Unfortunately, these proceedings have been insufficiently reported, from the circumstance, as we apprehend, that the consolidation of the law has not yet attained, in popular apprehension, the character of a great measure, affecting every man's interest in every relation, and peculiarly calculated to advance every other measure, public and private, either now or hereafter before the public.

Within the walls of the House of Commons the case is different. The interest on the subject is great, and every member feels that his labours of drudgery will be reduced the moment

the work is done, and that each well-directed step in the progress must sensibly hasten this consequence.

We wish to assist the aspirations of the House, by suggesting a practical course.

The natural and well-established rule for the construction of statutes, is, first, to ascertain the law; secondly, to ascertain the grievance; and, thirdly, to ascertain the remedy. Let no Bill for the alteration or amendment of the law be introduced till the Statute Law Commission, or a Select Committee of either House, or, mayhap, a Joint Committee of both Houses, have reported, in an assigned well-considered manner, the state of the law, the alleged or supposed defects, and the remedies, as well those which have been adopted in like cases, as those which have been proposed for the case in hand.

This is a work requiring no invention, but simply research—a work which would not involve the supersession of the functions of higher or more appropriate authorities, but simply assistance, and such too as, if properly and systematically compiled, with sufficient references to the sources of information, might be collated and tested: it would be as laborious as useful, but as feasible as essential to the proper conduct of legislation.

The preparation of such a work in detail would be the appropriate duty of the Statute Law Commission, or rather of those professional persons whose assistance the Statute Law Commission employs.

The Legislature, having before it its material so well arranged, might proceed by two methods in the execution of its work—by resolution and by instruction. By resolution, as to the principles of the measure; by instruction to its committees as to the details.

Having, in the first instance, or with the aid of subsequent experience, framed standing orders for its guidance in the structure and language of its acts, officers corresponding to the examiners of Petitions and the Committee of Standing Orders, might be employed to examine the Bills, in order to ascertain whether they had conformed to the laws of Parliament in force as to such matters.

In this way, Parliament would be relieved of a class of opera-

tions which it cannot satisfactorily perform, while its own proper objects, the principles, the general details, and the final sanction of the completed measure, would rest with it.

And after a very little while, from having the benefit of established rules and practice, its acts would become consistent and uniform, and there would be left time enough for those discussions on great questions which are at once its *forte* and its liking, and its appropriate duty.

But to give directness and steadiness to the course of proceedings, a new arrangement of its business should be adopted, similar to that which has taken place in the conduct of Private Bill legislation.

At present, the orders of the day teem with measures in every stage of advancement, the consideration of which is usually postponed to that of some engrossing subject, and then, at the close of the night, proceedings are hurriedly taken, or again postponed to some future day. The convenience of the members who have devoted themselves to the task is not consulted; and at last the measure comes on suddenly, and by surprise, in the absence of those who would best assist the deliberations of the House upon the matter; and intrigue, jobbery, conceit, ignorance, and incompetence succeed in the conduct and carriage of a measure which is to whip, with the bite of scorpions, the public, public officers, judges, statesmen, and the legislature itself upon future occasions.

Without quarrelling with the standard cry of the Administrative Reformers, "The right men in the right places," we would suggest a companion one, "The right work at the right times." We believe that by the neglect of this maxim, much talent and energy among our public men are sacrificed.

We propose that, after the private business and the interpellations of the minister, which have now become a rule of the day, are disposed of, say at five or half-past five or six, the Bills in some given stage should be taken in the order in which they have arrived at that stage; and that all questions involving great debate should be disposed of at a later hour, say eight o'clock.

Thus, we would assign to Monday, at that period of the night sitting, motions for leave and first readings; to Tuesday,

second readings; to Thursday, committees; to Friday, third readings; leaving Wednesday as now for measures of great detail or for adjourned debates, and the whole of the evening after eight o'clock for the *parler* of Parliament.

The Bills being taken in due order, everybody would know as nearly as possible the period of their discussion; and the waiters for the next coming measures would always assist in constituting an audience for that on hand.

By assigning measures in the same stage for the same evening, the considerations applicable to that stage would be more thoroughly regarded, and the interval of eight days or so between one stage and another would prevent precipitation.

The private business moves forward with great regularity. Why should private business fare better than the public? Why should not the agencies and methods, which are successful in the former case, be used in the latter? Why should the House pay so little regard to what is constant, and yield so willingly to irregular courses? Do not sacrifice all to routine; but, on the other hand, do not sacrifice all to disorder. The rule of all good organization is to provide for the constant and regular—well-appointed regular means, with due times and seasons, giving room for matters of extraordinary pressure and emergency.

As soon as the House should find itself affected daily by the measures submitted to it, it should insist on due preparation, on simplicity and uniformity, in everything, in short, which would assist and facilitate its labours.

We have heard, however, that this arrangement would interfere with dinner-time. We think not: the diners are not the workers of the House; the useful members, who do not make much show in debate, would be in attendance, and would be more fairly dealt with than they are now; for they are often kept in the House till after twelve, to do duty with exhausted faculties on measures which can no longer be postponed, instead of being, as they ought to be, with due regard to the claims of health and age, in their beds.

It is to the want of such arrangements as this, that so dire a murder of innocents annually takes place, after as dire a waste

of the time and energies of the House, and of its reputation among the people for wisdom and prudence.

In order to give solidity to these operations, let the Attorney and Solicitor General be required to be in attendance nightly at that period, and excused at the other periods; let the late Attorney and Solicitor General be also required to be in their places, to give assistance to the House, and for their labours of preparation let them have for each night's attendance a handsome fee, say 50*l.* per night, or 200*l.* a week.

In like manner let the Lord Privy Seal be a lawyer, and charged with the care in the House of Lords of all public measures, in so far as they affect the law of the land and the general interests of the State; and give to him and to the retiring Privy Seal a similar fee for their assistance.

In the space of one short session our legislation would assume a totally different character. The Statute Law Commission would be brought into active play, and the whole business of Parliament would assume a regular and efficient character, calculated to restore its reputation, and prevent the damage to the constitution which is resulting from its present conduct before the people. The clerk of the Parliaments, and the clerk-assistant of the House of Lords, the clerk of the House of Commons, and the counsel to the Speaker of the House of Commons, all gentlemen of excellent capacity and good dispositions, would be severally aiding, with tasks comparatively slight, from being divided among numbers, and assisted by the law officers of the departments; and we should be as much surprised at the facility and efficiency of our business as we are now disgusted with its hindrances and miscarriage.

Unceasingly we shall urge attention to these matters, and we would fain hope that our Statute Law Commission will cease to be the legal Sebastopol, which shuts out all who would intrude their investigations, either as friends or foes, making the Government an instrument to defend it against the interests of its members, and needlessly bringing them into disrepute.

Publicity would disclose its plans and operations, and possibly vindicate its purposes; while, perhaps, it would show that it is as

much crippled by want of means, as by an imperfect understanding of the matter among some of its members, or an imperfect support and assistance by others.

We deprecate this secrecy which obtains, since it leads those whose duty it is to discuss the subject, into inaccurate statements, or into contradictions, true perhaps in the letter, but not in the spirit.

The session has not yet manifested any results that do credit to the Commission. Its parliamentary appearances have not been satisfactory; and at this time of writing the estimates which contain the provision for the next year have not been laid on the table of the House. We understand that some among its members plead want of money, and that the habits of business and settling the amount of remuneration of the workmen lawyers, and paying it when earned, do not do credit to the administrative character of the Commission.

The secretary's want of experience in business has been aggravated by the uncertain policy of the Commission. Now, on the part of the noble and learned members of the Commission, we deprecate the position in which they are placed. It is as unfair to them as it is to the public interest, which respectively they represent.

Everybody knows how difficult it is to speak out, without apparent treason to the body to which you belong, especially when you have sat in confidential intercourse. It is for this reason, as well as for the direction of the public in this complicated matter, that we seek publicity. Besides, if the public knew the nature and requirements of the work, they would not only insist that the right men should be put in the right places, but that the right means should be assigned to the right work; they would not commit the folly of giving large fixed sums to some of the body without leaving proper funds for the remuneration of others. Publicity would necessitate a purpose and a plan; and under energetic and able guidance the labours would be at once energized and controlled. The active independent members of the House of Commons have come to find their interest in the matter; and we think it will not be long ere the leader of the House of Commons, of either party in the House,

will also find that for the management of its business, the consolidation of our laws as well as the consolidation of our institutions, is an essential condition. We have been observing the proceedings of the House this session with feelings of pain and pity—of pity for the sufferings of the attendant ministers and members, and pain for the apparent hopelessness of successful effort to escape from the maze of confusion in which we now are.

But meditating much on these things, we have come to the above conclusions, which we submit for the consideration of such of our readers as have a place in Parliament.

It is far from our intention to impute to the excellent Speaker of the House of Commons a neglect of any opportunity to improve; the proceedings of the House attest his readiness and ability to do whatever is feasible. His position precludes any motion on his part. This should be the work of independent members, and of the leading working men on all sides of the House; and we believe that we speak a well-known truth that men on all sides have not only an interest in lessening the drudgery of parliamentary attendance and duty, but are willing to support it by voice and action; but there is a want of men who, not fearing the reputation of red-tapism and routine, will be willing to give voice and action in the present need.

On this matter of red-tapism and routine we would say a word. We know of nothing in the universe, however wide-spreading and comprehensive, that does not owe its success to the fitness of its details, even to the least minutiae. The engineer and contractor learn this great lesson from the works of the Creator of all things; and they learn, moreover, that it is by the development and adaptation of details all perfection is attained.

Mere red-tapism and mere routine are absurdities—so are mere speaking and mere declamation. Each thing in nature by itself is an imperfection; its perfection is due to its comprehensiveness, associated with others, and to its completeness.

This is certain, that nothing good has come out of chaos, while chaos, order, and organization are indispensable to efficient action; and there can be no order or organization without purpose and plan, without method, men, and money.

We have heard much grumbling about the state of business in Parliament; but grumbling without adequate effect. Let each man put his grumbling into the shape of complaint, distinctly describing and defining the grievance as he feels it, and then collate it with others; we feel assured that the remedy must suggest itself.

In the mean time we point to the Statute Law Commission as an instrument ready to our hands. If it be inefficient, develop or abolish it. Development and organization would be our policy; development that would supplement and reinforce its members and its agencies, and organization, which would put the right men in their right places, with chance of realizing their work with credit to themselves; and if they fail, of due responsibility for their failure.

How miserable it is that in 1855 we should be urging what ought to have been done in 1853! How great the crime of those who peril a nation's greatness in this matter! The day of punishment and disgrace must surely come, and each year brings it nearer.

POSTSCRIPT.

We had written our remarks upon the Statute Law Commission before the announcement of its Report; which has appeared too recently to admit of our noticing its contents in our present number. It is signed by all the Commissioners, except the Attorney and Solicitor General; and we gather from the conversation between Lord Lyndhurst and the Lord Chancellor, and the recent notice by Lord Lyndhurst on the Government measures of Law Reform, that this omission has much significance. It is understood that those learned personages have not only felt much difficulty in maintaining the position of the Commission in the House of Commons, particularly on the motions of Mr. Locke King, but that they hold views on the course proper to be adopted on dealing with the consolidation of the Statute Law, much at variance with those which the Commission has adopted. In the minutes of the proceedings of March 14 and May 23 these views are described.

In the proceedings of Feb. 7 it appears, however, that Mr.

Bellenden Ker, whose function it is to consolidate the law, has been engaged in a work of a wholly different character, viz. the criticism and revision of the Bills introduced into either House of Parliament; and as a specimen of his skill on that task, has given a note on the Personal Estates Intestate Bill, which, by the energy of Mr. Locke King, has passed the Commons. It would be worth while to inquire how far we are indebted for this unconstitutional performance to the services of Mr. Locke King, in urging the attention of the Commons upon the proceedings of the Commission.

The task of timely revision would be a wholesome one; but it should be exercised impartially, openly, and by the recognised ministers of the two Houses, and done too in a manner to assist, and not to hinder: and the communication should be made while it is possible to turn the suggestions to some account.

We trust that the House of Commons will call for all the other reports upon its Bills; for the terms of the appointment of Mr. Bellenden Ker—for his instructions; and the general regulations for the safe conduct of so difficult and delicate a duty.

The observations on the Expurgatory List of Statutes and Mr. Coode's Digest, which form the sixth paper in the Appendix, also call for remark and severe reprehension.

It would seem that these Reports are to be made the means of carrying on the wars of Mr. Bellenden Ker; that his energies are directed to controversy, and not to action. He is skilful in showing why we should not do this or that, but not in the execution of his appointed task.

We shall endeavour in our next number to give a connected view of the whole matter, in the hope of laying the foundation of a thorough discussion in Parliament next session. In the mean time we postpone our notice of the Parliamentary proceedings of the present session, which have been of an unusually interesting character.

ART. X.—ENGLISH COURTS IN SAXON TIMES.

An Inquiry into the Anglo-Saxon Mark-Courts, and their Relation to Manorial and Municipal Institutions, and Trial by Jury. By William Maurer. London: Whittaker and Co., 1855. Pp. 62.

IT has been for many years an interesting subject of research to trace with accuracy the rise and progress of our civil and municipal institutions, and more particularly to discover how far the remains of the institutions established by the Saxons during their 600 years' possession of England exist at the present day, or are to be found modified in our own Courts of Judicature.

The publications of Mr. J. M. Kemble have done much towards simplifying the inquiry; an excellent article in the *Edinburgh Review* of Feb. 1822, followed up and enlarged (we venture to think by the same hand) in Sir Francis Palgrave's elaborate and learned "*History of the Rise and Progress of the English Commonwealth*," and the writings of other learned antiquaries, have gone very far towards an elucidation of the government and of the judicial courts of the Saxons in England; and we may now add to the authorities alluded to, the manual before us, being that of a foreigner for some time resident among us, who is well versed in the character of kindred institutions on the continent of Europe, and who has brought his knowledge to bear with judgment and ability on the labours of our best English authors. Moreover, he has availed himself of the works of Mr. Gage Rokewode; of the publications of the Record Commission here, and of German authors; and he has presented us with a view of the Anglo-Saxon courts in England, which expands our previous knowledge.

The popular belief is, that under the Anglo-Saxon system the chief government consisted in a direct appeal to the whole body of the people in each particular district; and the standing boast of those who avow themselves the lovers of our Anglo-Saxon institutions, in contradistinction to what they assert to have

been the prevalence of the Norman feudal system, is, that all power was exercised directly by the people. The truth, however, is, that the Anglo-Saxon system was a system of local self-government, carried out by certain persons chosen or selected from the main body: it was a system by which a portion of each district acted for the whole; and when a combination of districts took place, for objects common to the whole, the management rested with the persons deputed from each division, but acting together for the entire district. Whether these deputies or jurors were elected by their fellows, or what was the precise mode of selection, does not clearly appear. The duties which were committed to them, and the mode in which those duties were discharged, are apparent to us; and the continuance of many of the forms, and, with some variation, of much of the substance of these Anglo-Saxon courts through a period of 1,600 years, and their existence in our own day, is an evidence that they were well adapted to many of the exigencies, as well of a highly civilized as of the rude and primitive state of society in which they were framed or grew up.

The county or sheriff's court sitting monthly, and with the suitors as judges, was the best and in many counties was the only small-debt court, until the system received very recently its extension rather than its extinction by the establishment of County Courts; whilst the increase in the amount recoverable in these courts from 40*s.* to 20*l.*, and since to 50*l.*, is but an increase meeting the relative increase in the value of money, since the days when suitors were first excluded from the district courts and sent to the king's superior courts to recover larger amounts.¹ The office of coroner, and the right of presentment by the jury summoned to his court, and who make their presentment upon view as well as upon evidence, have undergone little change since the days which preceded the Norman conquest. Mr. Maurer is in error in supposing that at this

¹ The Saxon origin of the tourn is proved by the fact that it first existed in the southern or Saxon hundreds. Neither the tourn nor the frankpledge existed in the northernmost parts of the country: the tourn was established in the Wapentake of the Angles by the law of Ethelred: the frankpledge was not known along the Welsh borders, nor in the country north of the Humber.

day, any more than in the days of Alfred, this jury need be unanimous: it is sufficient if a majority, consisting of not less than twelve, concur in the verdict; and so it is also in the grand inquest in every county, city, and borough, a like number making up a majority is enough; so also is it in the presentments of nuisances and other matters in the courts leet of the hundred. The liability of the hundred for damage done in riots has remained since the times of the Saxon kings. The courts leet have indeed fallen very much from their former estate; the trial of criminals and of important civil causes in these leet courts fell gradually into disuse after the appointment of justices itinerant, in the time of Stephen (earlier than Henry II., which is the commonly received period), and after the increase of justices of the peace, who could be approached within easy distance in every part of the country: they were, however, regularly held for the appointment of tithing-men or constables till within the last few years, when a power of appointment was given to the justices of the peace; and yet they are holden and will continue to be holden in many hundreds, manors, and franchises, for the presentation of nuisances, the protection of the free course of the water, and the proper fencing of many pieces of land held under Inclosure Acts, in which a direct reference is made to the leet jury. More recent legislation may take away even this necessity: the rural policeman or the inspector of nuisances may supersede the Pindar or Hayward, and there may no longer be presentments of a tenant, *propterea quod permittet porcos suos vagare*. The ale-conners, though quite as much needed to protect the public as when our Saxon ancestors coveted good ale and punished those who adulterated it, may no longer hold their office; scolds may escape the penalties to which they were yearly subjected, in the court at which sat their neighbours who had witnessed their volubility; there may not henceforth be fines for not keeping up the tumbrel and stocks; the last of the pillories may rest as a show in the chancel of the church at Rye, just as the butcher's bones still inclosed in the chains which once swung near the spot where the murdered victim fell, rest in the upper room of the town-hall; but the very fact that all

these and other functions of the leet jury have continued to our own times, and that most of the duties will be discharged by other officers, demonstrates that the Saxon institutions were modified and not superseded under the Norman rule, and that the system of self-government has supplied very largely the wants of the rural districts.

The question whether these Saxon institutions were equally well adapted to the requirements of commerce and the congregation of large masses of people in cities and towns, must, we fear, receive a negative reply. Although it is assumed that corporate bodies are of comparatively recent origin, and an appeal is made to the government of many important towns (never incorporated) by the leet, yet we are inclined to think that this subject requires much more investigation than it has heretofore received. It is not clear to us that there are not very strong indications of the preservation in London, Exeter, York, the Cinque Ports, and many of the places settled by the Romans, of those municipal institutions, which existed in the time of Roman sway: these warriors, who occupied in a military sense, rather than peopled, the greater portion of our soil, and the traces of whose occupation are to be found chiefly in the great highways they formed or developed, in the stations they held, and in the villas they built near these highways, had undoubtedly a regular system of municipal government in cities, towns, and places frequented by their ships. Many of the customs of London and Exeter, and other places, were part of the Roman system: the process of foreign attachment, for instance, seems to have had a Roman origin, which has never been lost. The very term "barons," as chief citizens, exists in London and the Cinque Ports, and towns where the Romans had established *Municipia*, that is, towns governed by *Senatores*; and it seems to us very doubtful whether the guilds and associated bodies existing in other towns, some of which have since received grants of corporate rights, were not an extension from the towns of Roman origin to these other towns of something more analogous to the *Municipia*, than to the customs of the Saxon Mark Courts.

The preceding observations will best serve as an introduction

to the particular statements of Mr. Maurer, as the results of the works he has read, and the knowledge he has acquired.

In the time of Tacitus some progress had been made in the civilization of the people of England; for the pursuits of agriculture are compatible only with some settled habits of the people. At first the land brought into occupation was used by the tribe in common and its divisions, and in small quantities only by families or individuals. The use of land in common still exists in the unclosed lands of the South Downs, and in the Lammas lands and common fields, as also in the unclosed commons in many parts of the country. In the Saxon districts the bodies politic coincided with the bodies of joint occupiers: the rest were bodies rather of a private than a public nature; and these distinctions must be borne in mind to know the relative position of the Mark and the Hundred.

"The Hundred represents a division of the country originally based on the array of the people. This basis, which is acknowledged by those who assign a late period to the establishment of the *Hundred*, is a proof of the early origin of the system. The division into Hundreds is certainly an artificial one, inasmuch as it is not founded on an array of the families and *gentes* which constituted a community. Still it agrees perfectly with the condition of the Gothic tribes. The 'army' and the 'people' are only different expressions of the same idea: the army is the array of the nation in time of war; the office of the military commander and the judge appears always united in the same persons; the division into Hundreds implied at once an arrangement serving for both peace and war; a corresponding division of the territory emanated from this system, and the Hundred became thus a district for which a hundred men had to perform military service, and which had an ordinary court of justice. It thus formed a military, judicial, and territorial division, common to all the tribes of the Gothic race, not only to the conquerors of the Roman Empire. It is distinctly mentioned by Tacitus. In the North we find the *Haerad*, which, according to an old tradition, implied the same system; and although the original arrangement of a certain number being required was early lost sight of in Scandinavia, and perhaps also in Germany, the former existence of such an arrangement is sufficiently proved by that tradition; tradition, indeed, is all that in accounts of such divisions can reasonably be expected. We may find that the Hundreds and *Haerads* differ very greatly in extent of territory, still they present the original system of the political organization of the Gothic states, with the '*Hundredesgemote*' as the ordinary court of justice.

"The Hundred is observable in the original seats of the Saxons

and Angles; the conquerors established the same system in England; most probably with strict regard to the state of the population, and, as will be seen hereafter, on the ancient mode of counting by the "store-hundred" or great hundred. The Hundred was a body politic like the community at large; part of the territory occupied by the Hundred, the waste land, was held in common by the body of the inhabitants; such were the 'Haerada-Almaenningar' in Scandinavia, the 'Centalmende' in Germany. In England the Hundreds may early have lost their commons, owing, in some parts, to the increase of the population; in general, however, to the circumstance of 'Fololand' having fallen to large proprietors; still Commons of Hundreds can well be traced even in this country. With regard to such land held in common, the Hundred, a body politic, was a Mark; hence such a district was responsible to the community for secret murder (murdrum) committed on the commons: this at least was the origin of territorial liability.

"In the last place we have to consider the Mark, properly so called, the land occupied by smaller numbers of people, and for the more direct purposes of agriculture, of tillage and pasturage, the Mark of the village or township. Kinsmen would settle on a territory and be neighbours, as they were wont to stand by each other on the day of feud and war. The number of settlers might be increased through the reception of new comers, but it appears to be doubtful whether, in a political sense, such *gentes* had any analogy to those of Greece and Rome. The people who took possession of a tract of land as agriculturists, the members of the Mark proper, appear as associations based on the holding of such property, not as bodies politic. The Mark was protected by the law of the state, it enjoyed a special protection, not necessarily on religious grounds, but a protection similar to that enjoyed by the Free with regard to his household; hence the Mark, more especially the boundary, was called the 'Frith.' No one could settle within the Mark without leave of the markmen, and the new comer had to comply with the customs of the Mark. These customs concerned the usufruct of the land, the tillage of the ploughland, or at least the rights of pasture, the settlement of disputes concerning boundaries, regulations for the protection of the Mark, for keeping the roads in good order, and similar objects. The men of the Mark would assemble in a Mark-court, they would elect an officer to preside over the assembly, and provide otherwise for the wants of the association. It was only in progress of time that such customs, being entirely based on the special character of the Mark as an association of joint occupiers, would come into existence; and it has therefore been questioned, whether Mark-courts could belong to the earliest periods, to the time of Tacitus. The German Mark-customs are of comparatively recent date, at least in their present form; they contain unquestionably all the bye-laws in force at the time from which they had come down, and show that the Mark was strictly based on joint occupancy of land; the people of the Mark, indeed, inflicted severe punishments on those who had violated the

property of the markmen ; but from this, or from immediate execution of a 'handhabbende' thief, it cannot be inferred that the Mark-court was an ordinary tribunal ; moreover, four villages at least were required for an extraordinary court. As an association, however, the men of the Mark might well enjoy the right of excluding a member that had been convicted of a crime, and expelling him from the 'Frith.' Thus the people of Leycester would banish one that had committed 'hamsoken.' In the public courts the men of the Mark served as witnesses and compurgators. As their common property was protected, so, on the other side, they, as well as the inhabitants of larger districts, such as the Hundreds, were held responsible to the community for a crime committed on the commons of a Mark. 'Murdum' was not peculiar to England, though the Danish and Norman conquerors evidently construed this liability so as to serve as a convenient instrument for the oppression of the conquered."

The Court of the Hundred was held for objects of voluntary and contentious jurisdiction, but an immediate appeal to the neighbourhood might be necessary to secure the execution of justice, and the men of one village were called together ; but in general the jury was taken from the inhabitants of the four next villages, and consisted of the earldoman, assisted by two men, twelve men forming the "dozenne;" these four townships did not necessarily, from the first at least, form one Mark ; they were several Marks within themselves ; and though the four villæ formed a judicial district, it was at first a "bidden thing;" hence Mr. Maurer thinks called a "leet." The villæ might be subdivided, and some of the original leet districts dismembered, or there were, from the first, large villages laid out in a regular plan, with two cross-roads and four wards, like the cities of Roman origin ; and there was another distinction of frequent occurrence : a hamlet being a *villa* presented by three men, the *demi-vile* equal to two or three hamlets, and the *vile entiere*, which contained a full leet jury of itself.

"In the Court of the four villages judgment lay with the suitors, the markmen ; judgment was pronounced according to majority of votes. The three men of each of the villages, however, came probably early to form a standing magistracy. When a markman sued another, the twelve with the *Obaldirmon* sat as judges. If necessary, they might, not as a body, but still as judges, take a view of the subject of dispute ; from the nature of suits between markmen, such views would even be required in most cases : when sufficiently informed, the case was decided as said before.

"We have an instance of the twelve men sitting as judges in the

assize of Fitz Aylwin. The twelve aldermen of the assize were magistrates, elected from, and for, all the wards of the city; but the origin of this institution must be looked for in the custom of assembling the twelve men of four wards in a 'bidden thing,' which gradually assumed the definite form of the assize. The proceedings are exactly like those which we may suppose to have taken place in the Court of the Socn. As judges, the *XII. jurati aldermani* pronounced sentence upon oath; a majority of votes (seven) decided the case; so they did unquestionably in the Court of the Socn; so did the '*Schoeffen*' in the German marks.

"But the markmen, or the twelve on their behalf, sat also as a 'Wruegericht' as in the German Marks. They accused and presented persons suspected by the *Fama Patria* as having violated the property of the Mark; they presented all nuisances, obstruction of the roads, and so forth, and then passed judgment according to the bye-laws of the Socn, originally with the concurrence of the *Circumstantes*, the assembly of the suitors. The jurisdiction of the Court extended to cases of open theft, but when a case could not be adjudged within a limited time, or when the markmen had been called upon, in an extraordinary Court, to witness the circumstances of a case to be prosecuted in a public Court, then they or their *Quorum* appeared there as a collective body of witnesses representing the *Patria*, either on their own behalf or that of the plaintiff. As judges, they decided a case by majority of votes; but as *presenters*, either in the Mark Court, or the public Court, when they did not act as magistrates, but strictly in the name of the community, the *Quorum* made necessarily *unanimous* declarations. Procedure by public accusation was undoubtedly early known in the Saxon Mark Court. The mode, however, of procedure by inquest and presentment may have been more fully established after marks and courts-leet had passed into the hands of lords, when the steward of the lord would take regular inquests on articles belonging to the jurisdiction of the Socn. The original articles of the leet were gradually combined with those of the King's Court of the Hundred held by the sheriff, but are still clearly discernible in the long series contained in the 'Veue de Frankpledge.' The functions of the twelve of the leet in manors became gradually limited to presentments."

At the first institution of the tourn of the sheriff, the several leet districts appeared before the royal officer, and made presentments of criminal cases which had come to their knowledge; and "to give full effect to this system of public accusation, the so-called 'collective Frankpledge' was at the same time established;" and Mr. Maurer describes fully, and on the whole we think accurately, the powers and the obligations of the courts, and the persons liable to serve in them, observing, that "the Danish and Norman conquerors enforced the collective Frank-

pledge, the latter evidently availing themselves of the institution for political purposes; and it was partly for this reason that they watched so jealously over the privilege of the View, when claimed by feudal lords."

We are not disposed to go so far as Mr. Maurer, in ascribing a common, or perhaps a cotemporaneous origin, to trial by a jury of twelve, applied in criminal as well as civil cases; in the latter it existed at a very early period; it is not till far later times that we find the jury of twelve in criminal cases. Sir F. Palgrave maintains that the two juries ought not to be confounded, and he is most probably correct; at any rate, Mr. Maurer does not seem to us to have brought forward any sufficient evidence to show that the same rule applied in early days in criminal as in civil cases. The jury in criminal cases were usually the witnesses of the crime committed, or the recipients of the testimony of those who were the eye-witnesses, and the jurors carried out the law, awarded the punishment, and saw that the sentence was fully carried out; they were, in some respects, men who had authority to punish in a summary mode, not very unlike that in which Judge Lynch administers his punishments, in some instances, in another country of Anglo-Saxon origin: the authority of the entire state or district is indeed there wanting; the jurors, judges, and executors there combined are not the elect or selected of the mark or district; but they exercise themselves in performing the offices of Saxon jurors in criminal cases; and both, we suspect, are very liable to the taunt of those who

"Oft have heard of Lydford law,
Where in the morn they hang and draw,
And sit in judgment after."

W. D. C.

ART. XI.—THE LAW OF LANDLORD AND TENANT.

Being a Course of Lectures delivered at the Law Institution. By John William Smith, Esq., late of the Inner Temple, Barrister-at-Law ; with Notes and Additions, by Frederic Philip Maude, Esq., of the Inner Temple, Barrister-at-Law. London : Maxwell.

EVERY work from the pen of the late gifted and lamented Mr. J. W. Smith, whether originally published in his lifetime, or, as in the case of his Lectures on Contracts, posthumous, has been found to merit the careful attention, and to deserve the grateful thanks of that learned profession for whose use his writings were designed. The volume before us will be found fully to sustain the great reputation of its deceased author, and as regards the notes and references contained in it, which have been respectively prepared and selected with much care and discernment, to confer very considerable credit on its learned editor. Such were the qualities of Mr. Smith's mind, such were his habits of thought and of analysis, that he was alike fitted to excel as a legal writer, to vie with the cleverest in argumentation before our Courts in *Banc*, to search out the latent vice in complicated pleadings, or to digest and marshal the evidence requisite to support them when unimpeachable.

To us who have not seldom listened to Mr. Smith's arguments in *Banc* and in the Exchequer Chamber, his *oral* style, which was usually unimpassioned, correct but not ornate, appears strikingly akin to his *written* style, as exhibited in his well-known Treatises ; whilst the style in which his lectures are penned is almost identical either with the one or with the other, save only in so far as it is somewhat simpler, out of due consideration and regard for the audience to whom they were addressed. For such auditors, perspicuity and simplicity of style, combined with judgment in the selection of topics for discussion, were pre-eminently desirable ; and for each of these requisites Mr. Smith's lectures, as well on the Law of Landlord and Tenant as on Contracts, are very remarkable.

The work now before us comprises ten separate discourses, here "printed as they were left by the author; all the authorities referred to by him being inserted in the text." "The editor," however, being "responsible for the foot-notes, for those portions of the text which are included within brackets, and for the headings to the lectures and the marginal notes." The first lecture, which exhibits a general view of Tenures, is peculiarly calculated to be useful to the student. It opens with some remarks as to the meaning of the words "Landlord" and "Tenant;" the author observing, that "when we come to inquire what precise relation are they intended to express, there are few questions which one feels greater practical difficulty in answering; for, on the one hand, there is no doubt whatever that in point of strict law, wherever we find a subject in possession of land, *there* the relation of tenancy is in existence between him and somebody or other, since, according to the immutable rule of English law, no subject can have what is called *allodial* property, that is, land held of nobody. Some one or other must be his superior lord; and if no other person, then the Sovereign, of whom all the landed property in the realm is in the possession of subjects is thus ultimately held." It is, as further observes our author, very difficult to express in terms the precise idea which we attribute to the words before specified; "but I think that I am not far wrong in saying, that when we speak of 'Landlord and Tenant,' we have the notion in our minds of a tenancy limited in point of duration within some bounds not so extensive as to render the landlord's interest *practically* worthless, and accompanied by some remunerating incidents to the reversion, such as a rent, or at all events a fine in lieu of one; and also by certain obligations, such as covenants, or where the tenancy is evidenced by some instrument not under seal, agreements for the performance of the duties usually required from persons taking the description of property demised; and as these are the sort of tenancies which give rise to the great mass of practical questions involved in the law of Landlord and Tenant, it is to these that I intend almost exclusively to direct my remarks." Having thus indicated the main object of his Course, our author proceeds to sketch rapidly and tersely the

various tenancies of freehold, or less than freehold, known to our law, making reference also incidentally to the origin of the action of ejectment, and specifying with much precision the distinguishing characteristics of each of the kinds of tenure of which he speaks.

The three lectures following the introductory one treat of the various practically important points relating to the creation of a tenancy; the questions, Who may be lessors? Who may be lessees? What may be leased? The mode in which demises are effected; the nature and incidents of a lease. In this part of the work we notice also several useful and well-written notes, serving either to illustrate the text, or to correct it, when necessary, by the light of very recent decisions. We allude more particularly to the notes upon Estoppel,¹ leases by ecclesiastical persons;² on the operation of the Statute of Uses,³ on powers,⁴ on actions of covenant by tenants in common,⁵ on the difference between a lease and an agreement for a lease,⁶ on the different kinds of rents,⁷ on the construction of covenants,⁸ on covenants to pay rates and taxes,⁹ and to insure.¹⁰

Whilst inquiring, in his fifth and two ensuing lectures, in regard to matters incidental to the continuance of a tenancy, Mr. Smith applies himself specially to a consideration of the law of distress, which he designates as "the great and peculiar remedy of landlords," and bearing upon which are included in the work before us several able and interesting notes by its learned editor.¹¹ The three concluding lectures contained in the volume before us treat respectively of points relating to the determination of the tenancy, of the rights of parties at its expiry, and of the various modes in which changes in the parties to the demise may be effected. Throughout this part of the work also are interspersed notes, too numerous here to particularize, elucidating, with ample care and learning, the more important topics discussed or mooted in the text. An excellent and well-arranged index crowns the whole.

¹ Pp. 32, 78.

² P. 38.

³ P. 43.

⁴ P. 44.

⁵ P. 49.

⁶ P. 71.

⁷ P. 89.

⁸ P. 96.

⁹ P. 98.

¹⁰ P. 100.

¹¹ See particularly the note at page 142 in regard to the question—what is distrainable? and that at page 161, which elucidates the question under what circumstances may a landlord exercise the right of distress.

We have not deemed it necessary, in this brief notice of Mr. Smith's Lectures on the Law of Landlord and Tenant, to enter upon a minute analysis of their contents. The learned author's name and reputation offer a sufficient guarantee for the accuracy of the text, and we can certify to our readers that the remarks and references appended by the editor constitute a fit and worthy adjunct to it. With one further observation, then, we will conclude. Mr. Smith's career at the bar presents to us a marked exception to the rule that the proficient in legal literature must be contented to forego participation in the rewards and emoluments which are showered on the adroit practitioner. The author of whom we speak, albeit not immediately successful in obtaining a share of business commensurate with his peculiar ability, was, nevertheless, fast traversing the pathway to success when he was summoned from the stage of life. In him, the flame of a well-assured hope of worldly honour burnt strong and brightly, whilst the shadows of death were gathering and descending round him.

The success thus partially achieved by Mr. Smith, and wholly brought within his reach, was mainly, as we think, to be ascribed, not so much to his undeniably profound knowledge of law and legal principles, as to the remarkable perspicuity of his style, which vouched to his readers, as well for the existence of that knowledge, as for the complete and ready command over it possessed by its owner. If the remark which we have thus hazarded be true, it points to this suggestion, that our legal writers—of whom the number is rather on the increase than diminishing—will do well to pay somewhat more attention than has heretofore been usual to *manner*—to the mode of communicating their ideas; and they should not rest satisfied with the conviction—in most cases, we unfeignedly believe, well founded—that the *matter* which they have undertaken to supply has fairly and honestly been presented.

B.

Notes of Leading Cases.

EQUITY.

"CONSTRUCTIVE" NOTICE.

Ware v. Lord Egmont.¹

THE doctrine of constructive notice appears to be still as incapable of definition, and indeed of illustration, as it was in the days of Lord Hardwicke. It seems to be well-nigh an impossibility to give any description of it, which will not be found faulty upon its first application, or which will not be variously viewed by different lawyers, in reference to every new state of facts. It is no wonder, then, that for a very long period, learned judges have been in the habit of expressing their desire not to extend the doctrine. When the Lord Chancellor, in *Ware v. Lord Egmont*, said that, in his opinion, it was "highly inexpedient to extend the doctrine, or to attempt to make it apply to cases in which it has hitherto been held inapplicable," his lordship only, in substance, repeated an observation which had often fallen from several of his predecessors. Lord Lyndhurst, in *Jones v. Smith*,² said *he* was "not disposed to extend the doctrine of constructive notice;" and "in expressing this opinion," said his lordship, "I believe I act in conformity with the opinion frequently expressed by my immediate predecessor." And in the same case³ Sir James Wigram observed, "the affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided is sound in itself." The *reason* of this desire on the part of the judges to limit rather than extend the application of the rule of constructive notice was well stated by Lord Cranworth, in his judgment in *Ware v. Lord Egmont*, when he said that "where a person had *actual* notice, there could be no danger of doing injustice; and he was held bound by all the consequences of that which he knew to exist; but

¹ 4 De G. Mac & G. 460; and 3 Eq. Rep. 6.

² 1 Phil. 254.

³ 1 Hare, 70.

where he has not actual notice, he ought not to be treated as if he had had notice, unless the circumstances are such as to enable the Court to say, that not only he might have acquired, but also that he ought to have acquired the knowledge with which it is sought to affect him, and which he would have acquired but for his own gross negligence in the conduct of the business in question."¹

But, however clearly his lordship may have indicated the grounds of the leaning in the minds of judges which we have noticed, there is unfortunately an ambiguity in the phraseology which he uses, which indeed appears to be almost essential to the subject; if we may draw such a conclusion from the fact that the same equivocal use of terms is to be found in the decision of several other able judges, who are generally distinguished by their perspicuity and clearness of expression. What is the meaning of saying that "where a person had *actual* notice, there could be no danger of doing injustice," &c.? What is the real difference between *actual* and *constructive* notice? Is not *actual* notice an element in nearly every case of *constructive* notice? How is a man put upon inquiry—how can he be treated as being guilty of gross negligence for not pursuing an inquiry—unless he has had *actual* notice or knowledge (they here mean the same thing) of some fact or state of circumstances which lays the obligation of inquiry upon him? And yet we find perpetual obscurity and confusion introduced into the cases by the illogical use of both these terms. Thus, in *Jones v. Smith*, Smith, before advancing money on a mortgage, inquired of the mortgagor and his wife, whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate which was proposed as the security; and though he at first insisted upon seeing the deed, he finally advanced the money without having seen it or known its contents; on which state of facts the learned Vice-Chancellor says: "It is incontrovertibly clear that Smith had not *actual* notice of the mortgaged property being in any way affected by the plaintiff's interest." Now, whatever may be the degree or clearness of the notice here, it cannot be denied that it is of the same nature and character as what Lord Cranworth calls *actual* notice in the passage already quoted, in which he says there is no danger of doing injustice, as the party is bound by all the consequences of what *he knew to exist*. Here the party sought to be affected knew of the existence of the marriage settlement; we do not say, according to the present law of the

¹ 3 Eq. Rep. 13,

Court, he was, or that he ought to be, therefore affected with a knowledge of its contents; but certainly the notice, as far as he did possess it, was as actual as in the case where a man is served with a formal instrument of notice, or derives his information from the immediate exercise of his senses. We find Sir James Wigram elsewhere in the same judgment,¹ after stating that the cases in which constructive notice had been established, resolve themselves into two classes, thus distinguishes them:—"First," he says, "cases in which the party charged has had *actual* notice that the property in dispute was, *in fact*, charged, incumbered, or in some way affected; and the Court has therefore bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice." The second class he describes to be "cases in which the Court has been satisfied, from the evidence before it, that the party charged had *designedly abstained* from inquiry for the very purpose of avoiding notice." Whether this distinction is very logical, may, perhaps, be doubted, when we consider that where we have evidence that a man has designedly abstained from inquiry, for the purpose of avoiding notice, we may fairly assume that he has actual knowledge (and the same kind of knowledge, it may be, as that imputed to the first class of persons) that the property in dispute is, "in fact, charged, incumbered, or in some way affected." But we are at present merely upon the question of the ambiguous use of terms, and are not attempting to discuss the doctrine itself. We find in nearly every one of the cases of constructive notice, that it means only a kind of *incomplete actual notice*; and it would not perhaps be going too far to say that the proposition stated by counsel in *Procter v. Cooper*² is a fair account of what is now required by the Court, in cases where it is sought to apply the doctrine of constructive notice. "The Court," said counsel, "will not in a case of constructive notice admit anything short of positive proof of the facts from which notice is to be inferred. There must be knowledge of a particular fact to construe it as notice, and that fact must be of a kind likely to make an impression on the memory."³ Thus in *Ferrars v. Cherry*, a leading case on constructive notice, a purchaser with actual notice of a post-nuptial settlement, which included the estate in question, was held to have had constructive notice of the fact, that the post-nuptial settlement was supported

¹ 1 Hare, 55.

² 2 Drew, 4.

³ And see *Ashley v. Baillie*, 2 Ves. sen. 370; *Eyre v. Dolphin*, 2 B. & B. 206; *Senhouse v. Earle*, Ambl. 285; *Whitfield v. Faussett*, 1 Ves. sen. 392.

by an ante-nuptial agreement. In *Davies v. Thomas*¹ a purchaser was held to have had constructive notice of a will referred to in a marriage settlement, of which he had actual notice; which is only an application of the more general rule, that a purchaser having actual notice of one instrument affecting an estate, has constructive notice of all others that an examination of the first would have disclosed to him, if they came fairly in his way in the investigation of title.² *Daniels v. Davidson*,³ *Taylor v. Stibbert*,⁴ *Allen v. Anthony*,⁵ *Powell v. Dillon*,⁶ and all the cases turning upon possession, proceed upon the same principle: there is actual notice of a fact by which the property is affected, and it is the duty of the purchaser to inquire into and ascertain the particular significance and value of that fact. Yet we find Lord Manners thus expressing himself:—"On purchasing from Neville (the vendor), the defendant was aware that the plaintiffs were in possession of part of this estate as tenants; this, I admit (continued his lordship), was not actual notice of the plaintiff's title, but it was constructive notice, and would preclude the plea of purchaser without notice."⁷ Upon which the learned reporters make a marginal note, which informs us that "a purchaser aware of tenant's possession of part of the estate, has [*constructive, though not actual*], notice of the whole of the tenant's interest in the estate." Now, if we admit, for the sake of the argument, that there was a real ground for this distinction, who can pretend to say that it is of the least utility? Any one will admit that the introduction of purely arbitrary, factitious, and illogical distinctions into law, or any other science, can be attended with no advantage whatever, while they generally occasion considerable confusion, and exhaust a vast deal of ingenuity to no purpose on the part of those who endeavour to maintain them.

If we were to extend our inquiries into all the different classes of cases in which the doctrine of constructive notice has been applied, we should discover in nearly every one of them the same characteristic in this respect, viz., that constructive notice is only imperfect actual notice. Thus, where a man knows that the title-deeds are in the possession of another, he is held to have had constructive notice of the other's claim on the estate;⁸ if a purchaser knows that at the time of his purchase the legal

¹ 2 Young & Col. 234.

² *Coppin v. Fernyhough*, 2 Bro. C. C. 291. In all cases where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser has notice of that fact. (*Moore v. Bennett*, 2 Chan. Cas. 246.)

³ 17 Ves. 433.

⁴ 2 Ves. jun. 437.

⁵ 1 Mer. 282.

⁶ 2 Ball & B. 416.

⁷ 2 Ball & B. 421.

⁸ *Hiern v. Mill*, 13 Ves. 114.

estate is in a third person, he will be taken to have constructive notice of what the trust is;¹ if a person purchase from an heir-at-law, with notice of a will by the ancestor under whom the heir claimed, though he was ignorant of the contents of the will, he will be considered as being affected by constructive notice of such contents. But in all these cases, the decisions went upon actual notice of facts, which properly involved the whole of the knowledge imputed in each case. There is no more reason for applying the term "constructive" in these and such-like cases, than in the case where a person is served with a formal instrument—a "notice in writing,"—the meaning of which he mistakes, or which by accident he fails to read, or from which, though he does read it, he derives much less information than the law designed it should impart to him, and less than it would have imparted to him if he had read it more carefully. But who would call this constructive notice? Yet the term has been applied to a very analogous case²—almost all-fours with that which we have imagined—where a man had the opportunity of inspecting a lease, which he glanced at cursorily, and read but partially; and he was held to have had constructive notice of the contents of the lease. It may appear somewhat jejune to expend so much breath upon what, in the eyes of many persons, after all, may be only of trifling importance; but we think it is never a trivial task to demolish an idol of the Forum, especially in the domain of law, which has, more than any other science, suffered from an unscientific, and therefore obscure, technology. One or two more instances, however, and we shall have done with this part of our subject. There is a different class of cases from any that we have yet mentioned, in which the distinction is constantly assumed. In many cases we find it laid down that actual notice to the agent is constructive notice

¹ Anonymous, Freem. 137, pl. 171.

² *Smith v. Capron*, 7 Hare, 192, where Sir J. Wigram said: "In this case Mr. Capron (the defendant) *saw* the indorsement on the lease, and by that indorsement it appeared that the license to assign was necessary. It is also admitted that *he looked into* the body of the lease, and therefore he had actual notice of its contents, or such part of the contents as he thought it useful or material to read." He was, therefore, held to have constructive notice of a covenant against assignment without license which it contained. Here we have the same awkwardness arising out of the inaccurate use of words. Because he saw the indorsement, and looked into the body of the lease, he had actual [properly constructive, if the distinction is to remain] notice of its contents; not that he had actual knowledge, for that he denied, but that he knew of something, and had the means of knowing all that was alleged against him. Though Sir James Wigram used the word actual in his judgment, this case is usually classed amongst cases of constructive notice.

to the principal. In this class of cases, perhaps, more than in any other, there is room for the line of distinction; because it is easy to remember some cases where the notice or knowledge must be personal; though there may be others where it does not, and should not, make the least difference whether the notice were to a man or to his agent. Thus, notice must be personal in all cases where it is necessary to bring the party into contempt.¹ But we pass over those cases where there may be some ground for maintaining the distinction, and confine our remarks to those where none exist, or where, if they do exist, they are treated in a wholly arbitrary manner. In *Tunstall v. Trappes*,² it was argued (upon the authority of *Wyatt v. Barwell*³) by Mr. Pepys and Mr. Turner, on the part of the defendant, that the notice in that case being to a solicitor, and therefore constructive only, was not sufficient to give priority to an unregistered incumbrance over a registered one; and that nothing but actual notice had that effect: and Sir John Leach, in his judgment, decided "that notice to a solicitor or agent was *actual* notice to the client." This is quite true, no doubt, if it mean that a legal instrument, called a notice, served upon the solicitor, has the same effect in most cases as if it were served upon the client; or that knowledge acquired by a solicitor in a transaction or a treaty will be imputed to his client; but to what case of notice can we apply the term constructive, if not to this, when the person himself, who is to be affected, has neither the knowledge nor the means of knowing that with which he is said to be actually, not by implication of law, acquainted?

Much of this confusion has arisen from the many different meanings which are habitually attached in legal phraseology to the term notice. It is sometimes used to designate formal communications made in pursuance of provisions of Acts of Parliament, as in notices to treat by railway companies: we have it frequently used in a similar manner, in reference to proceedings under municipal, parochial, and local Acts; and in many other instances it is applied to designate an instrument. Then there are numerous acts of which the common law has cognizance, which come under the head of legal notice, as—notice of dishonour, notice to quit, notice to restrict the liability of carriers, &c.; in reference to each division of which there are a

¹ Anonymous, 11 Mod. 272; Anonymous, 12 Mod. 252. *E converso*, in an action on the case, for deceit, the misrepresentation or concealment must be proved against the principal; but in an action upon contract, the representation of an agent is the representation of the principal. See *Wilde v. Gibson*, 1 Cl. & Fin. 615.

² 3 Sim. 304.

³ 19 Ves. 435.

number of definite rules; and under this second head might also be placed notice in legal proceedings, as notice of motion, notice of objections, &c. In Courts of Equity, there is the rule known as the equitable doctrine of notice, which, as we have seen, is generally divided into constructive or implied, and actual or express notice.¹ In all these different uses of the term, it invariably implies *knowledge* in the party to be affected; or, some provision for giving him the opportunity of acquiring knowledge; or, that he is in circumstances where it is his duty, and he is bound to have knowledge, and where, therefore, it will be imputed to him. It ought not then to be a very difficult matter so to classify all the cases coming under the general head, as to enable the application to them of a clear and definite technology. In equity, the classification ought to be particularly easy; as, in truth, the equitable doctrine is independent of all those cases which have hitherto been commonly

¹ "Constructive" notice is not peculiar to Courts of Equity. It is also known at law. See *Hooper v. Lane*, 10 Q. B. 546. In a few cases it appears to have been carried further at common law than in equity; thus in *Edwards and others v. Cooper* (11 Q. B. 33), it was held that if execution be taken out in the names of two parties jointly interested as co-plaintiffs, and one knows of an act of bankruptcy already committed by the defendant, his knowledge is *prima facie* the knowledge of both; and there *Coleridge, J.*, was "inclined to say, though he desired not to be conclusive on the point, that even actual ignorance of an act of bankruptcy on the part of one co-plaintiff would not prevent notice to the other from taking effect as to both." See also *Wesson v. Allcard*, 8 Exch. Rep. 266. In general, however, there has been a great disinclination among common law judges to regard anything as notice which does not imply positive knowledge in the person to be charged with notice. *Parke, B.*, in *Cannan v. South-Eastern Railway Company* (7 Exch. Rep. 850), said: "We certainly think that unless compelled by authority to decide otherwise, we ought to hold notice of an act to be knowledge of it brought home to the mind of the person to be affected by it." But though knowledge is in the great majority of cases the object of notice, yet the terms are not always convertible; as, for instance, in cases of notice of dishonour for the non-payment of bills of exchange. Thus, in *Burgh v. Legge* (5 M. & W. 420), *Parke, B.*, said: "There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence. That is the true meaning of the word 'notice' when used in declarations of this kind, and the mere knowledge of a party is not enough." *Alderson, B.*: "We ought to construe the word 'notice' as meaning notification of the fact of the bill having been dishonoured after the presentment took place; and it is far better, for the advancement of justice, to adhere to this simple meaning than to confound notice with knowledge." In *Allen v. Edmundson* (2 Exch. Rep. 723), however, *Parke, B.*, stated, "that this view had been modified by subsequent cases; that the notice need not be positive and express on the point that the party giving notice means to hold the other party liable, because it is *implied* from the fact of the bill being presented."

ranged under the head of actual notice. Courts of Equity, as a matter of course, take cognizance of every kind of notice coming under either the first or the second head which we have given above: they always observe the requirements of legal and statutable notice: so far, there is no exercise of equitable jurisdiction. It is when the Court gives effect to notice, not of such a character, but upon the ground that it affects the conscience, that we have properly the equitable doctrine of (so called constructive) notice.

In *Ware v. Earl of Egmont*, in which the whole doctrine received considerable discussion both before the Vice-Chancellor and the Court of Appeal, the facts were as follow:—Nathaniel Polhill, who died an infant in 1802, became entitled in 1782, as tenant in tail, under the will of his grandfather, to certain real estates in the county of Surrey and elsewhere, and also to considerable personal estate absolutely. The testator by his will bequeathed his residuary personal estate to Way and Maitland, upon trust, at their discretion to lay it out in the purchase of real estate, to be settled to the same uses as the devised estates. In 1799, these trustees, who were not legal guardians of the infant, applied a portion of the infant's personal estate in the redemption of the land-tax, then existing thereon, under the statute 38 Geo. 3, c. 60. Upon the death of the infant, the real estates went to the second son of the testator, who took an interest for life in remainder under the will. His administratrix instituted the suit of *Ware v. Polhill* (see 11 Ves. 257), for the purpose of establishing a charge on the real estates in favour of the personal estate to the amount of the land-tax so redeemed. An order was made in that suit, declaring that the administratrix was entitled to annuities or rent-charges, as part of the infant's personal estate, to be charged on the several estates, to the amount of the land-tax respectively redeemed thereon, and to be redeemable by any person entitled beneficially to any estate or interest, in succession, remainder, or expectancy under the will. Under this decree, indentures of lease and release were executed by the tenant for life, and by the tenant in tail in remainder, on his attaining the age of twenty-one, in 1817: but no recovery was ever suffered for perfecting the security; and in 1828, on the death of the tenant in tail, the legal charge on the lands ceased. In 1881, the next tenant in tail in remainder suffered a recovery, and, in 1835, he sold such of the estates as were situate in Surrey to Lord Arden. These estates were described in the contract as having the land-tax redeemed. The annuities were duly paid by the successive owners of the estates, including the Surrey estates, to the personal represen-

tatives of Nathaniel Polhill, the infant. The present suit was instituted by the administratrix *de bonis non* of Nathaniel Polhill, to enforce the original decree against the defendants in respect of an annuity of 55*l.* charged upon the Surrey estate, and to obtain effectual security on the land. The defendants, who claimed under the will of Lord Arden, pleaded that they were purchasers for value without notice, and that the estates were sold to Lord Arden free from land-tax. It appeared that *the abstract of title, delivered at the time of the sale to Lord Arden, stated a certificate, in which the trustees of the will, who redeemed the land-tax, were described as trustees and guardians of Nathaniel Polhill, the infant.* The question was, whether Lord Arden had notice, in the statement of the certificate, as to the fund out of which the redemption-money was paid, and that such money constituted an equitable charge on the estate. It was admitted that neither Lord Arden nor his legal adviser had notice of the decree in *Ware v. Polhill*, or of the actual payment of the rent-charge.

The Vice-Chancellor Stuart, before whom the cause came on for hearing, held that the "statement of this document in the abstract was notice to a purchaser of a certain transaction; and he could not hold, without contravening all his notions of the true doctrine of notice as established in that Court, that if there be notice in an abstract of a peculiar transaction, which that was, he was bound to stop there, and say that a purchaser was not bound in the least degree to inquire into its nature. If the case had stopped there, without more, his opinion was, that upon the well-established doctrine of the Court as to notice, the purchaser was put upon inquiry." The redemption being on behalf of the infant, and of his guardians and trustees, his Honour considered that inquiry would have disclosed that it had not been wrought out so as to extinguish the charge. In allusion to the arguments drawn from *Jones v. Smith*, *Cothay v. Sydenham*, and cases of that class, the Vice-Chancellor said: "There is a wide difference between questions of notice, where there is notice of an instrument, either actual or constructive, without notice of extrinsic circumstances to impeach the validity of that instrument, on the ground of fraud or otherwise, and a case like the present, where there is notice of a particular transaction; and it is contended that notice was to be taken only of so much as the vendor chose to disclose. I think where there is notice of a transaction, of so peculiar and important a nature, affecting the title, as this appears to be, that such notice puts the purchaser on his inquiry as to all the circumstances supposed, ordinarily speaking, to affect his title."

The Lord Chancellor (having taken time to consider his judgment) said : "The question is, whether or not Lord Arden had not what is called constructive notice, which ought to have led him to institute inquiry ? If that is established, no doubt the defendants, who claim under Lord Arden, are bound by all the equity established by Lord Eldon's decree (in *Ware v. Polhill*). The circumstances relied on are—first, that the contract entered into by the guardians and trustees appeared, in fact, to have been entered into by them as pure strangers ; and, secondly, that the abstract stated the death of the infant tenant in tail unmarried. It was argued, that these facts ought to have put the purchaser on further inquiry, and that the result of such inquiry must have disclosed the fact that the redemption was effected out of the infant's personal estate. Is this so ? I entirely concur with what fell from his Honour, that a purchaser is bound to satisfy himself of the validity of the redemption of the land-tax. But the question is, whether he did do this sufficiently by satisfying himself that all proper steps were taken for extinguishing the land-tax. It is not disputed that a good legal title was shown, but it is contended that an adverse equitable title arises, not from the redemption having been effected by strangers, but from the circumstance that the consideration was paid out of the personal estate of the infant. Now, I think, not only was there nothing to show this, but there was everything to lead to a contrary conclusion. The trustees were described as guardians and trustees ; and there was nothing on the abstract to show that they were not so. But the point for inquiry was, not in what character they effected the redemption, but out of what fund they paid the consideration. I doubt whether in any case this is an obligation which can be fairly thrown upon a purchaser. In this case, we find that the testator gave residuary personal estate to the trustees in trust to invest in the purchase of lands ; and it is provided by the 39th section of the Land-Tax Redemption Act, that money so given may be applied in the redemption of land-tax. When we find that the land-tax was redeemed by trustees, who might have done so properly, it is impossible to charge a purchaser with gross neglect for not having inquired into the mode in which it was done. On this ground," continued his lordship—"that there was no gross neglect, and, indeed, no neglect at all—it is impossible to concur with the Vice-Chancellor, and I think it, therefore, unnecessary to refer to the other points which were raised." The Lord Chancellor differs, then, from Sir John Stuart, not as to the rule of notice, nor as to its being applied in transactions of an important and peculiar nature, affecting the title, where

something is disclosed to put the party on inquiring into all the circumstances, but as to the question whether in the present case the purchaser was or was not guilty of negligence. Sir James Wigram, in *West v. Reid*,¹ which was quoted in the argument, alluding to the misapprehension of his remarks in *Jones v. Smith*, observes, that "negligence—as applied to cases of constructive notice—supposes a disregard of some fact known to a purchaser, which, at least, indicated the existence of that fact, notice of which the Court imputes to the purchaser." In truth, in nearly all the cases of notice which come before Courts of Equity, the whole question at issue mainly turns upon the degree of negligence which can be proved against the person to be affected by notice,² or upon the laches of the person who ought to have given notice. In addition to the cases to which we have already adverted, which all come under the former head, let us look at a few which belong to the latter.³ In the case of the assignment of a debt, notice of the assignment to the debtor is necessary, as otherwise the debtor, through the laches of the assignee, might pay the money to the person who, without his knowledge, had ceased to be his creditor.⁴

In all those cases where the priority of charges on choses in action is in question, mere negligence is sufficient to let in the rule. It is different when the rule comes to be applied to equitable estates in land:⁵ there, neither the omission of one mortgagee to give notice, nor the activity of the other, gives the second mortgagee priority over the first.⁶ In all the cases in which notice is imputed to a purchaser who takes property where the possession is in a tenant, it is imputed because he is assumed to be aware of that possession; and being so, he is bound to inquire what is the interest of the tenant; and his not doing so is accounted negligence.⁷ Possession is notice to the pur-

¹ 2 Hare, 257.

² And so also in many cases at common law. See *Hooper v. Lane*, 10 Q.B. 546.

³ According to the Scotch law, there must be an intimation—distinct notice—of the assignment of a chose in action, before the assignee can exercise his full rights in that character. See *Boyle v. Ferrall*, 12 Cl. & Fin. 754.

⁴ *Jones v. Gibbons*, 9 Ves. 410; *Dearle v. Hall*; *Loveridge v. Cooper*, 3 Rus. 1.

⁵ In these cases the negligence must amount to fraud to admit of the application of the doctrine: thus in *Evans v. Bicknell*, 6 Ves. 183, Lord Eldon was of opinion that a second mortgagee who had the title-deeds without notice of a prior incumbrance, should not be preferred to the first mortgagee, unless the first mortgagee had been guilty of negligence amounting to fraud.

⁶ *Wilmot v. Pike*, 5 Hare, 22.

⁷ *Daniels v. Davison*, 17 Ves. 433 (and see remarks of Lord Brougham

chaser of the whole interest the tenant may have in the estate: It is notice, for example, of a right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded.¹ But where the possession is vacant, a purchaser is not bound to inquire of the late occupier what was the nature of his title;² and it appears that notice of a tenancy at will does not affect a purchaser with notice of the lessor's title:³ nor will the fact that the vendor has been out of possession for many years affect a *bond fide* purchaser without notice;⁴ and "if at the time of his purchase the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been considered that it is want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenant."⁵

Where a purchaser knows that the estate is affected by the interests of others besides the vendor, he will be held to have notice of these interests, for it is his duty to inquire as to the nature and the extent of these interests: thus general notice to a purchaser that there are leases, is notice of all their contents.⁶ And where a trust was generally recited in a lease, the lessee was affected with notice of the trust so recited, whatever that trust might be.⁷ Notice of a charge, although to an indefinite amount, or of a different character, is sufficient to put a party dealing with the property, on inquiry as to its extent or its character, even though the actual charge be incorrectly described.⁸ A member of a partnership will be held to have notice of all such facts relating to the business of the firm, as he may discover by ordinary diligence and attention.⁹ As a general rule it may be laid down, that where a party relies upon his

on this case, in *Miles v. Langley*, 2 Rus. & Myl. 627); *Taylor v. Stibbert*, 2 Ves. jun. 440.

¹ *Allen v. Anthony*, 1 Mer. 282; *Meux v. Maltby*, 2 Swanst. 281; *Hiern v. Mill*, 13 Ves. 120.

² *Miles v. Langley*, 1 Rus. & Myl. 39; confirmed on appeal, 2 Rus. & Myl. 626.

³ 3 Sug. V. & P. 10th ed. 473, or 1 Hare, 63.

⁴ *Oxwith v. Plumer*, Bac. Abr. tit. Mortgage (E.), s. 3, 2 Vern. 636.

⁵ Per Sir John Leach, M.R., in *Hanbury v. Litchfield*, 2 Myl. & K. 633.

⁶ *Taylor v. Stibbert*, 2 Ves. jun. 437; *Hall v. Smith*, 14 Ves. 426.

⁷ *Malpas v. Ackland*, 3 Rus. 273.

⁸ *Beaucé v. Muter*, 5 Moor. P. C. Cas. 69.

⁹ *Sadler v. Lee*, 6 Beav. 324.

ignorance of facts, he must show that he has used due diligence to obtain the information with which it is sought to affect him;¹ and where a party has knowledge of such facts as would lead any ordinarily cautious person to make further inquiries, he will be taken to have notice of those facts,² which, if he had used ordinary diligence, he might have easily ascertained: as Alderson, B., observed in *Whitbread v. Jordan*,³ “he is *not indeed bound to use extraordinary circumspection*, nor, on the other hand, *is it necessary to make out any express fraud on his part.*” We thus see that in nearly every case in which the doctrine has been applied, the real question is one of negligence or laches.

In *Hatch v. Searles*,⁴ recently heard before the Vice-Chancellor Stuart, and on appeal before the Lords Justices, we have another instance of the application of the doctrine of notice. Conway, the holder of a bill of exchange, was aware that it had been accepted in blank, having been present at the filling up of the bill; and it appeared that no consideration passed from the payee to the acceptor. The circumstances under which the bill came into Conway’s hands were somewhat doubtful. It was held by the Vice-Chancellor Stuart, and by both the Lords Justices, affirming his Honour’s judgment, that Conway should be held to have notice of the circumstances under which the acceptance was given, as he was bound by the knowledge which he possessed to have made inquiry, which would have shown him that the drawer had no right to pass it out of his hands.

In *Clack v. Holland*, a recent case heard before the Master of the Rolls, the doctrine of notice was also a good deal discussed. There a policy of assurance was assigned to two persons, Holland and Hawker, who were trustees of a marriage settlement; but the trusts did not appear on the face of the assignment. Holland, the surviving trustee, was indebted on his own account to one Cullington, and asked him to pay one of the premiums due on the policy, offering at the same time, by letter, to give him a charge upon the policy, and to assign it for his own debt as well as for the amount of the premium, and stating that Hawker (the other person named in the assignment) was dead, and that his interest in the policy was released. Cullington paid the premium, but the proposed assignment was never executed. Other premiums were paid, at the request of Hol-

¹ *Wason v. Wareing*, 15 Beav. 151.

² The facts of which notice or knowledge is to be charged against a person must be such as he would legitimately have arrived at if he pursued the proper inquiry.—*Cothay v. Sydenham*, 2 Bro. C. C. 391; Atty. Genl. v. Backhouse, 17 Ves. 293.

³ *Whitbread v. Jordan*, 1 Y. & C. 329.

⁴ 2 Sm. & Gif. 147.

land, by Riles; and Holland, by way of security for the premium and a further sum advanced at the same time, deposited the original assignment of the policy and the policy itself. Cullington and Riles claimed to have the amount of premiums advanced by them repaid out of the policy-mones, and the latter also claimed to have a charge for the further amount, in respect of which the deposit was made. The Master of the Rolls, in giving judgment, thus delivered himself: "Riles advanced the money without making any inquiry about Hawker, whether he was alive or dead, or what interest he had, although he must have had an interest either beneficial or onerous; and simply on Holland's representation that he (Holland) was solely interested. I think that Riles was bound to inquire, and that the case comes within *Jones v. Smith*. If he had inquired and received a satisfactory explanation, the case would have been different: but I am quite satisfied that he entered upon the affair, knowing well that he was embarking in an affair of great risk."

We think also that this case comes within *Jones v. Smith*, not only, we mean, within the rules for determining the fact of notice there defined by Sir J. Wigram, but within the case itself. In *Jones v. Smith*, the party sought to be charged with notice was told that there was a marriage settlement, but that it did not affect the mortgagor's wife's property; and it was not considered *crassa negligentia* that he inquired no further, though it turned out that the wife's property was affected by the settlement. In *Clack v. Holland*, the circumstances are not very different. The depositor of the policy represented that he was solely interested: the deposites did not disbelieve the statement, and, relying upon it, advanced the money. Yet one case is held to be within the rule of constructive notice, and the other not. Well might Sir J. Wigram remark:¹ "It is indeed scarcely possible to declare *à priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another."

In conclusion, to revert to our starting-point, is *Clack v. Holland* a case of actual or of constructive notice, according to the test laid down by the Lord Chancellor in *Ware v. Lord Egmont*? The deposites had actual notice that another person, besides the depositor, had had an interest in the policy, and "he was held bound by all the consequences of what he knew to exist." Might not a similar description be given of every case of constructive notice, even of *Jones v. Smith*, in which Sir J. Wigram observed, that if "Smith was affected with notice of the settlement, it was with constructive notice only"?

¹ 1 Hare, 55.

POLICY OF ASSURANCE.—NATURE OF THE CONTRACT.—
INDEMNITY.—14 GEO. 3, c. 48.

*Law v. The London Indisputable Life Policy Company and another.*¹

The case of *Godsall v. Boldero* (9 East, 72), which decided that a contract by a creditor to insure the life of his debtor was substantially a contract of indemnity against the loss of the debt, has received another shake, if it has not been completely demolished, by the case of *Law v. The London Indisputable Society*. The latter case, together with the decision in *Dalby v. The India and London Life Assurance Company*, may be considered as a complete overruling of *Godsall v. Boldero*, and therefore is entitled to take its rank as a leading case, from the great importance of the case which it overrules.

In *Law v. The London Indisputable Company*, the plaintiff being entitled by purchase from his son to a contingent legacy of 3,000*l.*, which had been bequeathed to the son on his attaining the age of thirty, effected a policy for 2,999*l.* with the defendants' company when the son wanted twenty months of that age, to assure the event of his attaining the age of thirty years. Previously to effecting the policy, he informed the secretary of the company of the nature of the risk against which he wished to be assured, and was informed that the practice of the company was to make such assurances for one or more complete years, and that therefore he ought to assure for two years. The policy was accordingly effected, and the premiums were calculated upon the ordinary terms of a life for two years, without any regard being had to the particular character of the risk to be covered. The plaintiff paid two premiums; and after the payment of the second his son attained the age of thirty years, and the plaintiff received the legacy of 3,000*l.* Subsequently, but before the expiration of the two years for which his life was assured, the son died; and then the company refused to pay the amount of the policy; whereupon the plaintiff filed his bill.

On behalf of the plaintiff it was argued that the contract in no respect depended upon the payment of the legacy, but was absolute. The case was not within the statute 14 Geo. 3, c. 48, which, as the preamble showed, was passed to prevent "a mischievous kind of gaming," by persons assuring lives in which they had no interest *at the time* of effecting the assurance. The defendants contended that it was only a contract of indemnity; and that after the legacy was paid, the policy was a mere gaming

¹ 1 Kay & Johns, 223.

transaction, which was void under the statute. It would be a complete evasion of the Act, they said, if, from having an interest in the life of another, for however short a period, a person were allowed to assure the whole life, or any period longer than that over which such interest extended; and this case was distinguishable from *Dalby v. The India and London Life Assurance Company*, inasmuch as in the latter case the policy was for the whole term of life.

The Vice-Chancellor Wood agreed with the judges of the Exchequer Chamber, that *Godsall v. Boldero* had not met with universal approval in the profession, though it was considered to be law. "The decision in the Exchequer Chamber," said his Honour, "independently of the high authority of that Court, appears to me to rest upon a right footing as to policies of this description. Policies of insurance against fire or marine risks are contracts to recompense the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that, in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment. Whatever event may happen meanwhile is a matter of indifference to the company. *They do not found their calculations upon that, but simply upon the probabilities of human life, and they get paid the full value of that calculation.* On what principle can it be said, that if some one else satisfies the risk on account of which the policy may have been effected, the company should be released from the contract? The company would be in the same position whether the object of the insured were accomplished or not; whether he were in a better or worse position, that could have no effect upon the contract with the company, which was simply calculated upon the value of life which they had to insure. The Exchequer Chamber came to this conclusion in the case of an insurance upon the whole term of a life, when the person insured had received the amount, to provide against the loss of which his insurance was effected. Then," continued his Honour, "I have first to consider the particular contract in this case. It was distinctly, that if the person whose life was insured should die within two years from the date of the policy, in consideration of the payment meanwhile of two premiums, the company would pay to the person insuring a fixed sum of money. I cannot import into that contract any other consideration than

what would be the value of insuring the life against the contingency there mentioned. If there had been evidence of any mistake in the terms, there might have been a case for reforming the contract; but the statement is, that the plaintiff represented that he wished to insure against the risk of his son dying within twenty months, and that the answer was, that the company made their policies annual in point of form, and therefore in this case proposed to insure against the risk of the son dying within two years. If they had said they would charge only such premiums as an actuary should calculate for the risk of his dying with twenty months, then the policy ought to be reformed. * * The company, therefore, got the full value in premiums for that insurance for two years; and, accordingly, I cannot be in the least doubt what should be the result."

There is really no distinction in principle between this case and *Dalby v. The India and London Life Assurance Company*. Both take the same view of the nature of the contract of life assurance; viz. that it is a contract to pay a stipulated sum of money upon the death of the assured, or upon his attaining a certain age; of which it is an obvious corollary that it cannot be considered as a contract of indemnity.

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CLIENT.—FRAUD.
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CLIENT.—FRANCIS
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held in

CLIENT.—
De G. Mac. & G. 270.
The client was held in this case to
have not acted in his professional
capacity for ten months previously to the
transaction of the whole of the client's
business was sold. In July, 1848,
the defendant, who was his
partner, expressed
the consideration being expressed
was paid, and an annuity of 40l.
was purchased the remainder
of the business. The bill was filed by the
defendant, on the
ground that the transaction, on the
part of the client subsisted at the
time, and might have made a better
arrangement, first, that the relation
was, and secondly, that if
it appeared that he had
arranged an arrangement. His ne-

It appeared that he had in 1838 an arrangement then incurred. His next case for Holman, in 1843, was in 1846, he was not the latter good until money for the year, and sold; and was an agent Holman. It was the Justice of the Peace. That was for his although should be of Justice between and relation

Is him, they could not have been successfully impeached on the ground of inadequacy of consideration, or upon any ground appearing in the evidence in this cause." His Lordship stated the test deducible from the cases, as to whether a person is to be regarded as being the professional adviser of his client at the time of a purchase by himself. "An attorney may deal with a client as a stranger where the circumstances are not such as to *put him under the duty* of advising the client," but not otherwise; and the ground of the rule which requires him to do so is that "the confidential relation has been determined, or is not put at arms' length, is the influence which arises from the position of attorneys; and I doubt much," he continues, "whether the confidential relation can be said to be determined whilst the influence derived from it can reasonably be said to remain. * * If these transactions had taken place the day after the business of the sale by auction was at an end, could it have been said that the parties stood towards each other in any different relation from that in which they had stood? Could the defendant in such a case have been released from the duty of advising Holman? I think clearly not. Does then the lapse of time between the auction and the defendant's purchase alter the case? It does not appear to me that it does. No other solicitor had in the mean time been employed by Holman; and the true state of the case appears to me to be, that there was not *any cessation* of the relation, but a continuation of the circumstances which were necessary to bring the relation into action. I may add, upon this part of the case, that it is not perhaps unworthy of remark, that in those cases where attorneys have been concerned in previous sales, the relation must, in some sense, be a continuance of the confidential relation between them and their clients. They must be bound, in their future dealings with the client as to the property which they have been employed to sell, to communicate any information respecting that property which they have obtained during their employment."

COPYRIGHT.—AGREEMENT BETWEEN PUBLISHER AND AUTHOR.

Benning, 1 Kay & Johns, 168.

By a memorandum of agreement between an author and publishers, it was agreed that they should print, reprint, and publish his works, and that he should prepare it all before a certain day, set the proof-sheets, and superintend the printing; and that the publishers should direct the mode

Short Notes of Cases.

ATTORNEY AND CLIENT.—FRAUD.

Holman v. Loynes, 4 De G. Mac. & G. 270.

The relation of attorney and client was held in this case to subsist, although the attorney had not acted in his professional capacity for his client for sixteen months previously to the transaction which was sought to be set aside. In 1846 there had been an attempted sale by auction of the whole of the client's property, when only a small portion was sold. In July, 1848, Holman the client sold to Loynes the defendant, who was his solicitor, a portion of the same, the consideration being expressed to be 600*l.*, though only 260*l.* was paid, and an annuity of 40*l.* for Holman's life. In 1852, Loynes purchased the remainder for an annuity of 26*l.* to Holman. The bill was filed by the heir-at-law of Holman, to set aside the transaction, on the ground that the relation of attorney and client subsisted at the time of the sale; and that Loynes might have made a better bargain for his client. The defence was, first, that the relation of attorney and client did not subsist; and secondly, that if it did, the defendant had acted properly. It appeared that he had acted for Holman in 1836, and that in 1838 an arrangement was made in reference to the costs then incurred. His next employment was the preparation of a lease for Holman, in 1843, from which time, until the sale by auction in 1846, he was not further engaged for Holman. From the latter period until April, 1847, he continued to act as attorney for the vendor, and was the agent for getting the estate sold; and there was an entry in his own book, in 1848, charging Holman for drawing the agreement for the sale of the premises to himself. It was held that the relation of solicitor and client subsisted when the defendant made his purchase from Holman in 1848. That being so, the Lord Chancellor held that he was bound to show *that by no industry could he have got a better bargain for his client*; and that the defendant not having proved that,—though no moral fraud was imputed to him,—the sale to him should be set aside. "It may be admitted," observed the Lord Justice Turner, "that if these transactions had taken place between Holman and any person not standing in a confidential relation

towards him, they could not have been successfully impeached upon the ground of inadequacy of consideration, or upon any ground appearing in the evidence in this cause." His Lordship then stated the test deducible from the cases, as to whether a solicitor is to be regarded as being the professional adviser of his client at the time of a purchase by himself. "An attorney may deal with a client as a stranger where the circumstances are not such as to *put him under the duty* of advising the client," but not otherwise; and the ground of the rule which requires him to prove that "the confidential relation has been determined, or the client put at arms' length, is the influence which arises from the position of attorneys; and I doubt much," he continues, "whether the confidential relation can be said to be determined at all, whilst the influence derived from it can reasonably be supposed to remain. * * If these transactions had taken place the day after the business of the sale by auction was at an end, could it have been said that the parties stood towards each other in any different relation from that in which they had before stood? Could the defendant in such a case have been absolved from the duty of advising Holman? I think clearly not. Does then the lapse of time between the auction and the defendant's purchase alter the case? It does not appear to me that it does. No other solicitor had in the mean time been employed by Holman; and the true state of the case appears to me to be, that there was not *any cessation* of the relation, but only a cessation of the circumstances which were necessary to call the relation into action. I may add, upon this part of the case, that it is not perhaps unworthy of remark, that in those cases where attorneys have been concerned in previous sales, there must, in some sense, be a continuance of the confidential relation between them and their clients. They must be bound, in any future dealings with the client as to the property which they have been employed to sell, to communicate any information respecting that property which they have obtained during their employment."

COPYRIGHT.—AGREEMENT BETWEEN PUBLISHER AND AUTHOR.

Stevens v. Benning, 1 Kay & Johns, 168.

By a memorandum of agreement between an author and publishers, it was agreed that they should print, reprint, and publish his book, and that he should prepare it all before a certain day, and correct the proof-sheets, and superintend the printing thereof; and that the publishers should direct the mode

of printing, and should bear and pay all the expenses, and take all the risk of publishing; and out of the produce should first repay to themselves such expenses, and divide the profit equally between the author and themselves; and that, if all the copies should be sold and a new edition should be required, the author should prepare the same, and the publishers should print and publish the second and every subsequent edition of the work on the same terms; and that if all the copies of any edition should not be sold off within five years after the time of publication, the publishers should be at liberty to dispose of the remaining copies either by public auction or private sale, or otherwise, to close their account. After the publication of a first edition (in 1841), in pursuance of this agreement, one of the partners in the firm of publishers retired, and the remaining partner thereupon entered into a partnership with another person; and in 1844 the new firm published a second edition, revised by the author. In 1849 they published a re-issue of this edition; and in 1851 one of the partners became bankrupt. Subsequently, his assignees and the remaining partner conveyed to the plaintiffs all the copyrights of the firm. Another bookseller published a third edition of the work, edited by the author, who had no knowledge of the assignment. Upon these facts the Vice-Chancellor Wood held that the contract was a personal contract by the author, and not a contract for the assignment of his copyright; and that therefore the benefit thereof could not be assigned by the publishers. "The most," said his Honour, "that I could infer upon this contract, as to its equitable effect in favour of the publishers, if they were now before me, would be, that during its subsistence, they performing all the conditions on their part, the author would not be at liberty to transfer to any other person the right of printing and publishing this work, nor himself to conduct the publication of it through other hands."

This decision has been affirmed by the Lords Justices.

SOLICITOR WHO IS A TRUSTEE.—COSTS.

Broughton v. Broughton, 2 Sma. & Gif. 422.

The case of *Cradock v. Piper* (1 Mac. & G. 664) has been considered to have relaxed the rule, that a solicitor who is trustee shall not be allowed in any case to receive costs out of the trust estate. The case of *Lincoln and Windsor* (9 Hare, 158), however, decided by the Vice-Chancellor Turner, restored the rule to its old strictness. In the present case, a testator had employed a

solicitor, who was a member of a firm, to devise a scheme for the disposal of his estates, which was partly carried out during his lifetime. By his will, he appointed his wife, who was sole *cestui que* trust, and the solicitor, trustees thereof. It appeared that the widow had employed her co-trustee in the administration of the estate out of court, and that his employment was particularly beneficial to the estate. The present suit was instituted by creditors. The Vice-Chancellor Stuart reluctantly held, upon the authority of *Lincoln v. Windsor*, that the solicitor was entitled only to costs out of pocket. Within the last few days, his Honour's decision has been affirmed by the Lord Chancellor; and his lordship, in his judgment, referred to the observations of Lord Brougham in *Maunsell v. Baine*, a case recently decided in the House of Lords, in which Lord Brougham said that he never understood the principle of the decision in *Cradock v. Piper*—an observation in which the Lord Chancellor fully concurred.

PARTNERSHIP.—SPECIALTY DEBT.

Powdrell v. Jones, 2 Sma. & Gif. 305.

There were articles of partnership under seal, containing the usual covenant by the parties, to be true and just to each other in all their dealings, and by which each bound himself, his executors, &c., in the penal sum of 5,000*l.*, for the due performance of the partnership articles; but there was no covenant for payment of the balance due on the settlement of the partnership accounts. On the death of one of the partners, he was found to be indebted to the firm in a much larger sum. The Vice-Chancellor Stuart held, that the express contract as to the amount of debt under specialty excluded any implication by which that amount could be enlarged as a specialty debt.

MARRIED WOMAN.—TRUSTEE AND CESTUI QUE TRUST.—
BREACH OF TRUST.

Brewer v. Swirles, 2 Sma. & Gif. 219.

A married woman, having an absolute power of appointment over property settled to her separate use, induced the trustees to lend the fund upon an unauthorized security. The fund was thereby lost, and she subsequently executed an appointment of the fund in favour of her infant children, who, by their next friend, filed a bill against the trustees. The Vice-Chancellor

Stuart held that the suit was not maintainable. He considered, though the appointor was under coverture, that so far as regarded the property in question, she must be regarded as a feme sole; and though she had not followed strictly the method prescribed in the settlement, that she had absolute power to deal with the property, and therefore she could not maintain the bill, and neither could her appointees.

RULE IN SHELLEY'S CASE.—RESULTING FREEHOLD.

Arnold v. Coape, *Coape v. Arnold*, 2 Sma. Gif. 311; S. C. 4 De G. Mac. & G. 574.

A testator devised all his real estate to G. H., his eldest son, for ninety-nine years, if he should so long live, and subject thereto, to trustees and their heirs, for G. H.'s life, in trust to support contingent remainders; with remainder to the heirs of the body of G. H.; and, for want of such issue, remainder to his second son in like terms. By a codicil, after confirming his will, the testator devised his real estate to trustees for the payment of his debts, and to secure a jointure for his wife. It was held by the Vice-Chancellor Stuart, that the heirs of the body of G. H. took by purchase, and that no equitable freehold resulted to G. H., so as to attract the operation of the rule in Shelley's case, and create an estate tail in him. The Lord-Chancellor affirmed his Honour's decision, and said that his understanding of the rule in Shelley's case had always been, that it applied only to the case of remainders created by the same instrument which creates the particular estate of freehold.

TENANT FOR LIFE.—PERMISSIVE WASTE.

Powys v. Blagrove, 4 De G. Mac. & G. 448.

Courts of Equity have always declined to interfere against mere permissive waste, as it does in cases of wilful waste, on the ground that it would tend to harass tenants for life and jointresses, and that suits of the kind would be attended with great expense in depositions about the repairs; and therefore, in this case, the Lord Chancellor affirmed the judgment of the Vice-Chancellor Wood, refusing to make a tenant for life in possession accountable in equity at the instance of a remainderman for permissive waste.

LANDLORD AND TENANT.—PRIVITY OF ESTATE.—SPECIALTY DEBT.

Vincent v. Godson, 4 De G. Mac. & G. 546.

Wherever there is the relation of landlord and tenant, whether by lease under seal or by parol, rent ranks as a specialty debt; but in this case it was held that the right to treat it so is incident to tenure, and not to contract; that is, to privity of estate, and not to privity of contract; and the Court, therefore, would not apply the rule to the case of lands out of England.

VOLUNTARY ASSIGNMENT.

Beech v. Keep, 18 Beav. 285.

Courts of Equity will not constitute a *cestui que* trust under a voluntary instrument. But where a party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by the Court. Such was the rule as stated by Lord Eldon in *Ellison v. Ellison* (6 Ves. 662). In *Bridge v. Bridge* (16 Bevan, 315), Sir John Romilly, M.R., remarking upon this rule, observed, "The question before me will depend more upon those cases where the donor professes to assign for the benefit of the donee some previously existing chose in action. On this subject," said his Honour, "some points are, I think, reasonably clear. If a person possessed of stock execute a declaration of trust of that stock in favour of a volunteer, he would, I apprehend, clearly constitute himself a trustee for the volunteer, and equity would execute the trust, and compel a transfer of the stock to the *cestui que* trust. But if the same person executed an assignment of the stock in favour of the volunteer, and no transfer of the stock took place, this, I apprehend, would be as clearly considered to be no more than an imperfect gift, in which the donor had not done all that it was in his power to do; and the donee would get no assistance from a Court of Equity to compel a transfer of the stock." Therefore, in this case, where some consols belonging beneficially to A for life, with remainder to B, stood in the name of two trustees, of the survivor of whom B was the representative, and voluntarily assigned the stock to A, but no transfer was made, his Honour refused either to declare her a trustee of the stock for A, or compel her to transfer it. "I admit," he remarked, "that there is a very thin distinction between an assignment for the benefit of a volunteer, and a declaration of trust in his favour, but it is one which is to be found in all the cases."

MORTGAGEE IN POSSESSION.—AUCTIONEER HAVING A POWER OF SALE.

Matthison v. Clarke, 3 Drew, 3.

It was held, in *Broughton v. Broughton*, *suprà*, that the rule which prevents a trustee from making a profit out of the execution of his trust is not altered by the circumstance of the trustee being in partnership with another, and that the *firm* has acted for the trust estate. So it was in the present case, in which a mortgagee, with a power of sale, caused the mortgaged estate to be sold by a firm of auctioneers of which he was a member. The Vice-Chancellor Kindersley held, that the firm was not entitled to charge any commission, upon the ground that a mortgagee in possession is in the situation—in respect of the rents and profits—of a trustee. He is bound to account to the mortgagor for any surplus. So, if a mortgagee has a power of sale, and executes it, he places himself in a fiduciary character, because he sells upon trust that he will hold any surplus for the *cestui que* trust, and that he will account to him for such surplus.

DOMICILE.—ADMINISTRATION OF ASSETS.

Wilson v. Lord Dunsany, 18 Beav. 293.

The domicile of a testator regulates the priorities of creditors, though the personal assets may be situate and are administered in another country. In this case, the testator was domiciled in Ireland, and died, leaving personal assets both in that country and here, and also simple-contract debts, and debts upon which judgments had been obtained here. Sir John Romilly, M.R., was of opinion that he must treat the case in the same way as if he were administering the estate in Ireland, on the principle of the law of the domicile of the person whose estate was to be administered. It was also held, that a foreign judgment constitutes but a simple-contract debt.

COMMON LAW PROCEDURE ACT.

EVIDENCE BEFORE EXAMINER, 17 & 18 VICT. c. 125, s. 99.

Buckley v. Cooke, 24 Law J. Chan. 24.

If a witness gives evidence before the examiner inconsistent with previous statements which have been made by him, and upon being examined as to such previous statements does not admit them, it is competent for the party producing him to bring forward evidence of such previous statements. The interpretation clause (section 99 of this Act) does not confine the word "judge," in those sections which are extended by section 103, to every court of civil judicature in England and Ireland, to a judge of a Common Law court. The Vice-Chancellor Wood said he hoped the examiners would take down questions as well as answers for the future.

STATEMENT OF GROUNDS OF RULE *Nisi*, 17 & 18 VICT.
c. 125, s. 83.

Drayson v. Andrews, 24 Law J. Exch. 22.

A rule *nisi*, drawn up on reading an affidavit and deposition, called on defendant to show cause why a new trial should not be had, "on the grounds set forth in the said affidavit and depositions." This is no compliance with this section, which enacts that in every rule *nisi* for a new trial, &c., "the grounds upon which such rule shall have been granted shall be shortly stated therein."

The plaintiffs were allowed to amend; but it was held that the rule was imperative whether the defendants were misled or not.

SIGNING JUDGMENT UNDER 17 & 18 VICT. c. 125, s. 25.

Rogers v. Hunt, 24 Law J. Exch. 23.

Plaintiff cannot sign final judgment under section 25 of the Common Law Procedure Act, 1852, for want of appearance to a writ, specially indorsed, claiming (*inter alia*) the expense of noting and commission on a bill of exchange, the same being unliquidated damages.

POOR-LAW SETTLEMENT BY ESTATE.

Wendren v. Stithians, 24 Law J. Mag. Cas. 1.

Settlement by Estate.—A. in 1793 occupied, at a rent of 1*l.* 11*s.* 6*d.*, certain land, on which he subsequently erected a dwelling-house and other buildings, but did not expend 30*l.* In 1804 a lease for ninety-nine years was granted to him by the owner of the fee, in consideration of his paying the rent and performing the covenants, and “in consideration of his having erected a dwelling-house and half of a barn, to be for the joint benefit of the other part of the land demised to J. S.,” the rent reserved by the lease being 1*l.* 11*s.* 6*d.* The property was not of the annual value of 10*l.* This is a purchase of the term for a pecuniary consideration less than 30*l.*, and conferred no settlement after actual residence, by virtue of 9 Geo. 1, c. 7, s. 5.

RATING SCIENTIFIC INSTITUTIONS, 6 & 7 VICT. c. 36.

Purchas v. Holy Sepulchre, Cambridge, 24 Law J. Mag. Cas. 9.

The exemption of literary societies from rateability under this Act applies only to buildings “instituted for the purposes of science, *literature*, or the fine arts *exclusively*.” And inasmuch as the chief use made of the building was for a news-room, the Court held that it was rateable, Lord Campbell maintaining that newspapers gave “political information.” Be it so; but they, and the other periodicals on a news-room table, also contain a great deal of general literature; and is there not such a thing as *political* literature? And if so, is not the view taken, with great deference be it said, by the Court both narrow and incorrect? We trust that this decision will be overruled. We invite societies to try it again. Many are interested in it.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the LAW MAGAZINE, will henceforth be noticed—either shortly, or at length—in its pages.]

The Law of Contracts. By John William Smith, Esq., late of the Inner Temple, Barrister, and author of "Leading Cases," "A Treatise on Mercantile Law," &c. Second edition. By John George Malcolm, Esq., of the Inner Temple, Barrister-at-Law.

WE hail with great satisfaction a new edition of Smith's Lectures on the Law of Contracts. Ever since they were first published, these lectures have been most popular with all branches of the profession. To the student they have furnished a pleasing introduction to the study, and a ready guide to the mastery of this branch of law; and to the practitioner, also, they have been of essential service.

Perhaps, of all the legal writings of the late talented author, none excel them in point of lucid arrangement, aptness of illustration, and gracefulness and simplicity of style. That a work, so happy both in plan and execution, should have been rendered permanently imperfect or useless, through the progress or changes of the law, would have been a calamity to the profession; whilst to embrace in the design and illustrate in the style of the author, the accumulating judicial and legislative contributions to the law of contracts, preserving at the same time the elementary character of the work, is a task not easy of performance.

This, however, is precisely what Mr. Malcolm (already favourably known as an editor of Starkie on Evidence) has accomplished in the work before us. Rejecting the system of foot-notes, and thus relieving us of the wearying task of reading, as it were, two books at once, he has boldly incorporated his emendations with the text, from which he has distinguished them, together with such notes of the late editor as he has retained, by inclosing them between brackets. He has thus interwoven with the original matter all the important additions to and qualifications of the law of contracts, which have grown up since the publication of the lectures; and in doing so, has entered most happily into the style and spirit of the author. He has filled up, with care and accuracy, the outline originally given of the law with respect to estoppel, merger, patent and latent ambiguities, and the construction generally of contracts; and has collected and commented upon the recent cases relating to the sufficiency of the consideration, and to the construction and effect of contracts in restraint of trade. The meaning and effect of what is known as the "policy of the law," are likewise ably discussed, and the changes in

the law of usury and gaming are noticed. He has also introduced the very important cases relating to joint-stock companies, in which the rights and liabilities of parties connected with abortive companies, and of shareholders and purchasers, in the event of a call or upon a transfer, or devolution of shares, &c., are determined. There are some valuable pages with respect to the law of contracts, effected through the medium of factors and brokers; and upon the subject of remedies, the changes introduced by the Common Law Procedure Acts are fully detailed. These lectures thus constitute in this edition a complete though necessarily general sketch of the law of contracts as at present existing, and may be justly deemed one of the most valuable works which we possess upon this subject.

Cornish's Treatise on Purchase-deeds of Freehold Estates, and incidentally of Leasehold Property, with Precedents and Practical Notes. A new edition. By George Horsey, Esq., of Gray's Inn, Barrister-at-Law, &c. London: Shaw and Sons, 1855.

IN many respects this is a remarkable work. Originally published in 1829, it was the precursor of the modern forms of conveyancing, in respect to brevity and conciseness. Certainly it is most highly creditable to the sagacity of the author, and demonstrates the soundness of his acquaintance with principles, to find that so little advance has been made ahead of the principles which being then in a miserable minority, he so many years ago advocated, and so little improvement effected in the framework in which he embodied his views. But the book is not only remarkable: it is in the highest degree adapted for use. To the country practitioner, whose business requires that he should have at hand, ready for instant use, collections of reliable precedents, it will be found invaluable, for it supplies that requirement; and the ample notes, which are really what they are called, "practical notes," giving reasons and explanations of the text, and pointing out in what manner alterations may be made, so as to adapt the different forms to the different combinations of facts and circumstances, make it as easy to handle and as safe a guide as can be recommended to an attorney's clerk. Nor do we know where the student will be able to meet with 250 pages containing an equal quantity of valuable information with these on the subjects of which they treat; indeed, it would be no surprise to find the novice who had thoroughly mastered them, a match for not a few of his seniors. This work having been given to the world at a time when the public was not prepared for innovation, and had not acquired the now reigning tastes for brevity, despatch, and economy of time, labour, and expense, attracted but little attention, and has never been as well known as it deserved to be. Mr. Horsey, however, the editor of the new edition, by careful additions and improvements, has brought up the work to the standard of the present day, and supplied all and removed everything that modern legislation has rendered necessary to be supplied or removed in respect of a work of the kind. It is with

great pleasure that we see justice at last done, in this revival of so useful a performance, to the late Mr. Cornish's great talents and high services, to which we have, as in duty bound, before now borne our testimony (see *Law Mag.* vol. iv. p. 517); and to our minds there can be no doubt but that in its new and ably arranged dress it will meet with a rapid and general acceptance.

A Manual of the Practice and Evidence in Actions and other Proceedings in the County Courts, with the Statutes and Rules. By J. E. Davis, Esq., Barrister-at-Law. Second edition. London: Butterworths. 1855.

WE are glad to see that the excellent little work, written some time since by Mr. Davis, on the evidence requisite to support suits brought in the County Courts, has now reached a second edition. That the idea of such a work was happily conceived, we have often thought; that it was well executed, and has proved useful to that class of practitioners for whom it was designed, is sufficiently proved by its success. We are glad to perceive that the work is now considerably increased in size, and that a detailed account of the practice of the County Court has been inserted in it. The fourth part of this Manual, which treats of the evidence in actions for torts, and contains references to many recent and important cases upon that subject, appears to us to have been prepared with much care, and is calculated to be very serviceable to suitors. We may indeed congratulate Mr. Davis on the judgment which he has throughout displayed in selecting and arranging the materials of which his present volume is composed.

An Introduction to the Study of Jurisprudence; being a Translation of the General Part of Thibault's *System des Pandekten Rechts*, with Notes and Illustrations. By Nathaniel Lindley, Esq., Barrister-at-Law. London: Maxwell. 1855.

THIS book, in fact, consists of two parts—the first, or body of the work, being a translation of the well-known treatise of Thibault, accompanied with copious references to the *Corpus Juris* and its commentators; the second part comprising notes and illustrations, the main object of which seems to be, as well to explain the text as to illustrate it, by comparing and contrasting the principles which it exhibits with our own system of jurisprudence. The design here indicated of tracing up the principles of English law to the time of Justinian is very laudable; and though we can scarcely hope that a project so vast will ever be successfully accomplished, we nevertheless recognize, in the notes and illustrations to the volume before us, the results of much patient thought and of very considerable research.

The following extracts, we believe, present a fair specimen of the style and manner of our author. Having in his character of translator inserted in the body of his work the following sentence—

“The maxim *cessante ratione legis, cessat lex ipsa*, is altogether false

when applied to restrictive interpretation. If, after a time, the reason of a law ceases to exist, the law itself nevertheless continues binding; and it is not to be interpreted restrictively merely because some particular case may not come within its reason. Restrictive interpretation is only to be adopted when it can be shown that the lawgiver did not intend the law to extend to the case in question." He thus comments upon it in the subsequent portion of his volume:—

"The rule referred to [in the text] for the logical extension of a law, *ob identitatem rationis*, is usually expressed thus, *ubi eadem legis ratio, ibi eadem dispositio*; and as there is, even to jurists, something seductive in a nicely-sounding phrase, they have been induced to say contrariwise, *cessante ratione legis, cessat lex ipsa*. Against this maxim, when applied for the purpose of rendering a law inoperative, it is necessary, however, to protest. Two cases have to be considered.

"1. The *ratio* of an old law has ceased in consequence of a change in the habits of the people. The law, nevertheless, remains binding until it is repealed by the lawgiving power; for as a positive law is binding, not in consequence of its adaptation to circumstances, but by virtue of its sanction, so it does not lose its force until that sanction ceases. Besides, it is often in the highest degree desirable not to disturb existing relations; and juridically speaking, a rule frequently derives much more importance, both to sovereign and subject, from the length of its standing than from its conformity to reason.

"2. The *ratio* of a law may happen not to apply to some individual case falling within its words; or, expressed otherwise, the law would not have been made if such cases had alone to be provided for. Here again the law must be held to apply; for the Romans adopted the very sensible rule, *jura generaliter constituuntur*, and, consequently, in order to insure certainty and consistency in their decisions, applied the law even to cases to meet which alone it would not have been made."

Those who ignorantly prate of the utter worthlessness of the study of Roman jurisprudence, and those who in a more humble spirit entertain misgivings as to its importance, will alike do well to purchase and ponder over the volume which we have in the above remarks endeavoured to introduce to notice. It will be found, if we mistake not, to enlighten their ignorance,—to remove their doubts,—to teach them a habit of *generalization*, in which we fear that English lawyers and law-writers are as a body singularly deficient.

Commentaries upon International Law. By Robert Phillimore, M.P., Advocate to her Majesty in her office of Admiralty. Vol. II. London: Benning and Co. 1855.

By a notice prefixed to this volume, we are glad to learn that the important work, of which the above is an instalment, will shortly be completed. When it is so, we purpose offering some remarks upon

it; for the present, however, contenting ourselves with the following extract, which has some peculiar interest at this moment:—

“It is not easy to define the existing relations of the Patriarchate of Constantinople to the Russian Church. The Patriarch, whilst these pages are being written, is reported to have rebuked the Emperor of Russia for the schismatic condition of the Church in that country, and to have refused his proffered protectorate for the Greek Church.

“The Patriarch of Constantinople has recently entered into a concordat with the Crown of Greece. The ministers of that Crown sent a formal letter to the Patriarch, accompanied by an unanimous decree of the Holy Synod of Greece, dated May 30, 1850. This document contained the following among the propositions: ‘That the Synod of Greece holds as a most solemn obligation the duty of piously conceding the primacy guaranteed by the sacred canons to the œcumenical throne of Constantinople, as the first chair of the Catholic Apostolic Orthodox Church, and to commemorate first him who sits thereon in the sacred diptychs, according to the established order of the Church. In addition to this, wherever spiritual questions may arise, which require united deliberation and action, for the greater edification and confirmation of the Orthodox Church, they recognise it to be a duty that reference should be made first to that chair.

“This and the other propositions of the letter were formally ratified and confirmed by the Patriarch of Constantinople, his associate synod and suffragans, in a synodical decree.

“It is remarkable that, not long before the Papal aggression in England, which has been just discussed, Pius IX. made an attack of a similar character upon the Eastern Church.

“On the 6th of January, 1848, he issued ‘an *encyclical letter* of the One Holy Catholic and Apostolic Church to the Orthodox in all parts,’ in *modern Greek*, ‘to the Easterns,’ containing some very unfortunate errors,—among others a reference to the Council of *Carthage*, instead of *Chalcedon*; but neither this mistake nor the *modern Greek* appears to have been the cause of the great irritation and offence caused by this memorable epistle, of which it is now not easy to obtain a copy: it was the assumption of authority, the implicit denial of the Greek episcopate, which roused this long oppressed Church, and caused it to return, in *classical Greek*, ‘an answer which will never be forgotten, of the Orthodox Eastern Church to the encyclical epistle of his Holiness the Pope of Rome, lately sent to the Easterns.’ This answer corrected the historical errors of the Pope, and enumerated the offences against the unity and peace of the Church committed by Rome, while it vindicated the faith of the Greek Church in a manner worthy of its best days. We have already considered the claim of the Emperor of Russia to protect the subjects of the Porte, who are members of the Greek branch of the Catholic Church—and would that we could speak in the past tense of the terrible war into which this protection has plunged Europe, and perhaps the world.

"It only remains to add that the great powers of Europe, who in 1827 had *intervened* for the purpose of establishing the kingdom of Greece, *intervened* again in 1853 to *guarantee* that the successors to the throne of Greece should profess the faith of the Orthodox Eastern Church."—Pp. 452, 454.

The Law relating to the Probate, Legacy, and Succession Duties, including all the Statutes and Decisions on those subjects, with forms and practical directions. By Leonard Shelford, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworths.

HAVING been in the habit for years past of referring for information to Mr. Shelford's Treatises, particularly to his edition of the Bankrupt Act and of the Real Property Statutes, we are enabled to bear testimony to their accuracy, and to the great amount of learning and research displayed in them. Mr. Shelford's works on the Law of Lunacy, and on Marriage and Divorce, have acquired an established reputation. So far as we have been enabled, on careful examination, to form an opinion as to the present volume, it will fully sustain the high reputation of its author; its aim and object are thus stated by him: "The Succession Duty Act, 1853, having altered in some important particulars the Legacy Duty Acts, and applied some of its provisions to the former Act, it occurred to the author that a methodical arrangement of the several provisions of those Acts would form a useful Manual of reference for the use of the practitioner." In pursuance of this idea the author has, in four elaborate chapters, composing the body of his present work, severally discussed the Stamp Duties on Probate and Letters of Administration; the Legacy Duty Acts; the construction of the last-named statute; and the Succession Duty. In the appendix to Mr. Shelford's useful volume are contained the Succession Duty Act, 1853; rules for determining the value of an annuity of 100*l.* in certain cases; forms, with directions for using them; and a learned note on the Queen's Remembrancer's office.

A Treatise on the Administration of Trust Funds under the Trustee Relief Act, with an Appendix, containing the Trustee Relief Act, and the Act for the further relief of trustees, the General Orders and Forms of proceedings. By John Darling, Esq., Barrister-at-Law. London: Stevens and Norton. 1855.

THIS is a very carefully written work upon the important enactments above specified, the nature and aim of which are thus stated by the learned author:—

"The principal object which the Legislature had in view in passing the statute 10 & 11 Vict. c. 96, commonly called the Trustee Relief Act, was to improve the position of trustees, by enabling them to free themselves more easily from the burdens and liabilities of their office. Before the passing of the statute, a trustee could not obtain the assistance of the Court of Chancery in cases where the execution of his trust was attended with

any difficulties, without a suit being instituted, either by himself, or his *cestui que trust*, for the administration of trust property. Nor when the trust was a continuing one, and the trust instrument contained no power to appoint new trustees, could he retire from his office, without giving rise to a suit for the appointment of new trustees. Now, apart from the reluctance which conscientious trustees would naturally feel in burdening the trust property with the expense of a suit in Chancery, the Court did not consider them warranted in acting so as to lead to that result, either by retiring from their office, or by declining to act except under the direction of the Court, unless they were able to show that they had good grounds for the course they adopted. If they failed to establish this to the satisfaction of the Court, although their conduct in the matter might not have been marked by any want of good faith, they were generally refused their costs, whether the suit was one for the administration of the trust property, or for the appointment of new trustees.

"It is unnecessary to say that this state of things was frequently productive of much embarrassment and inconvenience to trustees; and to provide a suitable remedy for it appears to have been the main design of the Legislature in passing the Trustee Relief Act. That statute is intended to enable trustees to relieve themselves of their trust in a simple and inexpensive manner, and so to give them a larger power of getting rid of the burdens and liabilities of their office than they formerly possessed. With this view it authorizes the trustees in the first instance, upon their complying with certain formalities, to pay the trust funds in their hands into the Court of Chancery, and then empowers the Court to execute the trust in a summary way upon petition. The trust is thus shifted from the trustees to the Court at a comparatively trifling expense to the trust property. It should be observed, that the Act is confined to property of which the Court can conveniently accept the trusteeship, and that its provisions, in consequence, extend only to money, and to the ordinary public funds and securities."

We cannot forbear adding that there is an excellent index to the volume whence the above extract is taken.

The Endowed Charities, with some Suggestions for further Legislation regarding them. By J. P. Fearon. London: Longmans. 1855.

THIS is a very interesting and important pamphlet, throwing much light upon the state and condition of our Endowed Charities. The following extract from it, giving an account of the proceedings—and the results attained by them—in reference to St. Cross, will, we are assured, be acceptable to our readers:—

"Lord Guilford, as the master, had granted leases for lives, taking fines, the great bulk of which he appropriated to his own use, a small proportion only being reserved to the almspeople, and small rents were reserved. On inquiry, it appeared that the rents and fines and other considerations paid by the lessees amounted to the fair value, and there was no case for impugning the validity of the leases. On the other hand, the information prayed for a declaration of the Court, that the master was not entitled to appropriate the fines to his own use, and that he might be decreed to account for and restore them to the charity. Lord Guilford, in his defence, put forward a document found among the muniments of the charity, and called the '*consuetudinarium*.' This document bore date A.D. 1696. It

stated that upon search made among the records of the hospital, no statutes could be found directing its government; but that the same was then, and had been time out of mind, governed by customs and ways taken from and in pursuance of former grants and donations of the founder, which customs it proceeded to set out in detail, stating, among other things, that it had been the custom and usage that the master should receive all the profits and revenues, with which he was to bear the charge of the house, in manner therein particularly mentioned, and the repairs, and to retain the surplus to himself; and that upon the renewal of the leases, each brother was to receive 2*d.* in the pound from the tenants on the amount received by the master, such 2*d.* in the pound being paid by the tenants over and above the sums received by the master; but that the whole fines of copyhold estates had always been due and payable to the master only.

"Upon this document Lord Guilford was sworn on his admission to office. The Court has overthrown it, and has declared that it was unauthorized and a fraud upon the charity, and that the master was not entitled to apply the fines to his own use; but whilst so ordering, the judge did not direct any account for the past, nor give costs against the defendant, a conclusion which could only be understood as meaning that although the so-called '*consuetudinarium*' was void, yet it did, until set aside by the decree of a Court, afford some justification to Lord Guilford, as a document on the faith of which he took office.

"The case of St. Cross involved other questions to which it is unnecessary here to refer. The decision, with reference to an account and restitution of the fines, occasioned much public disappointment. It had been assumed as a matter of certainty, that as the abuse was patent, restitution to the charity would follow. Such might have been the case but for the existence of the *consuetudinarium*. The law officers of the Crown, after the decision, entered, with the assistance of the counsel, who with them had conducted the case, into a careful review of the whole facts, and arrived at the conclusion that there was no case for rehearing or appeal. The result of the proceedings is, that the old and vicious system of leasing on fines has been stopped; but the Court has found itself unable at once to replace the charity in the position which it would have occupied if the leases had not been granted by Lord Guilford. The chief benefit is prospective only; but eventually an income of 8,900*l.* per annum will be realized."

We commend the pamphlet, from which the above extracts are taken, to the perusal and earnest consideration of those philanthropists who feel an interest in the conservation and well-being of our Endowed Charities.

The Inventor's Guide, &c. By J. G. Moore. Parry and M'Millan, Philadelphia. Trübner and Co., London. 1855.

THIS is a useful and convenient manual of the Patent Laws of the United States. "It aims," remarks the author in his preface, "to direct the patentee how to proceed in obtaining a patent for an invention or design; it explains to him the relative bearings of the laws on all classes of discoveries; it indoctrinates him into the spirit of those laws, and points out to him the way to seek redress, and how to combat grievances." The work before us, we doubt not, will be very serviceable to many, on this as well as on the other side of the Atlantic.

Kritische Zeitschrift. 2nd half of Vol. XXVII. 1855.

THIS critical periodical of the Law, Jurisprudence, and Legislation of foreign countries, contains articles on the North American Marriage Law.

The new Poor Law for the kingdom of the Netherlands, with the discussions thereupon in both chambers.

On the schemes for Codification of the Criminal Law, with the letters of the judges thereupon, and the letter to the Lord Chancellor, containing observations on the answers of the judges, by C. S. Graves and J. J. Lonsdale.

French Canon Law.

Report of the Academy of Legislation of Toulouse of 1852.

Sundry new French juridical works.

North American State Law.

An Improved Edition of the Statutes of the present Session. Edited by S. B. Bristowe and G. W. Hastings, Esqrs., Barristers-at-law. Wildy. Part I.

THIS is the first number of a very cheap and well-planned edition of the statutes of the current session, brought out under the auspices of two able and judicious editors.

Besides the above works, we have received the following pamphlets and magazines, some of which will hereafter from time to time be noticed, when the subjects of which they treat chance to occupy the public mind:—

Injustice of the Law of Succession to Real Property of Intestates. By P. J. Locke King, Esq., M.P. Third edition, considerably enlarged. Ridgways.—A Letter to Lord Brougham, by the Chevalier de Chatelain, on the question of Trusteeship in England. Hardwicke.—A proposed Plan for dealing with the Statute Law, in a Letter to the Lord Chancellor. By James Kempay, M.A. Benning and Co.—Suggestions for a General Index or Title to Real and Personal Property, in a Letter to the Lord Chancellor. By W. R. A. Boyle, Esq., of Lincoln's Inn. Wildy.—The Transfer of Land and Judicial Registration, a Letter to Sir R. Bethell, M.P., her Majesty's Solicitor-General. By C. Mills Roche, Esq., solicitor. Butterworths.—On the Amendment of the Bankrupt Law. Hodges and Smith, Dublin.—The Journal of Psychological Medicine and Mental Pathology, for July, edited by Dr. Winslow; the Westminster Review for July, 1855; the Assurance Magazine and Journal of the Institute of Actuaries for July; and the Asylum Journal, published by authority of the Association of Medical Officers of Asylums and Hospitals for the Insane, edited by Dr. Bucknill. We have also received three bulky pamphlets, containing a statement of facts, and a report of the judgment in the case of Talbot v. Talbot, in the Irish Ecclesiastical Courts, which came to hand too late to insure adequate attention in this number.

Events of the Quarter.

MISCELLANEOUS.

CHANCERY QUEEN'S COUNSEL.—*Courts in which they practise.*—The following arrangement has been made as to the courts in which the Queen's Counsel will practise:—

Master of the Rolls.—R. P. Roupell, Esq.; E. J. Lloyd, Esq.; Roundell Palmer, Esq.; B. S. Follett, Esq.

V.-C. Kindersley.—C. T. Swanston, Esq.; C. P. Cooper, Esq.; J. G. Teed, Esq.; James Campbell, Esq.; John Baily, Esq.; W. B. Glasse, Esq.; James Anderson, Esq.

V.-C. Stuart.—C. Temple, Esq.; J. Walker, Esq.; L. T. Wigram, Esq.; James Bacon, Esq.; R. Malins, Esq.; W. Elmsley, Esq.; R. D. Craig, Esq.

V.-C. Wood.—John Rolt, Esq.; Thomas Chandless, Esq.; John W. Wilcock, Esq.; W. T. S. Daniel, Esq.

The Law Amendment Society proposes to establish a West-end Law Library, and it requests donations of books.

The Articled Law Clerks propose the formation in the City of a Society having for its object the debating of legal and jurisprudential questions, and the intellectual improvement of law students who are articled, and who would be willing to give a society of that nature their encouragement and support. We wish their laudable enterprise every success.

JURIDICAL SOCIETY.—The last meeting of this Society before the long vacation was held on Monday evening, at its rooms, Trafalgar-square. Harris Prendergast, Esq., in taking the chair, apologized for the absence of the Solicitor-General, who was prevented from being present by his parliamentary duties. Mr. J. Napier Higgins, one of the honorary secretaries, announced that several letters had been received from several distinguished persons to whom the first publication of the Society had been presented; among others from the Lord Justice Knight Bruce, and from Professor Mittermaier, of Heidelberg, who highly eulogized some of the papers which it contained. Mr. J. F. Macqueen read the paper of the evening, the subject of which was, "Divorce, especially in regard to the rights of wives." This Society is rapidly rising in practical utility and acknowledged reputation.

REFORMATORY SCHOOLS.—The magistrates of the West Riding, at the last quarter-sessions held at Pontefract, unanimously passed a resolution that it was desirable to establish, as early as possible, a Reformatory School for the West Riding, and that the Secretary of

State be memorialized accordingly. In the North and East Ridings of the county an association has been organized for the reform of juvenile offenders, under the presidency of his Excellency the Earl of Carlisle, the Lord-Lieutenant of the East Riding, and the patronage of many of the most influential noblemen and gentlemen of that part of the county. Nearly 1,000*l.* has been already subscribed. These schools will rapidly defeat their own object, and create a disastrous reaction and collapse of all better-directed effort. The State has no right to shift the charge of criminals to private hands and the experiments of philanthropy. It is an amiable furor just now which will have its day and expire.

MONUMENT TO THE LATE JUSTICE TALFOURD.—The mural monument subscribed for by the members of the Oxford Circuit, and sculptured by Lough, to the memory of the late lamented Justice Talfourd, has been placed in the Crown Court, Stafford, against the wall between the two galleries. The bust is life-size, but (says the *Wolverhampton Chronicle*) many whose personal knowledge of the late judge entitles their judgment to respect, are of opinion that the likeness is not a good one; and much of the effect of the whole is marred by some few misplaced ornaments, if we may be allowed such a term on such a subject. The base of the monumental tablet in which the bust is placed bears the following inscription:—

On the Judgment Seat of this Court,
While addressing the Grand Jury,
ON MARCH XIII., MDCCCLIV.,

Wrote

SIR THOMAS NOON TALFOURD, Knt., D.C.L.,

One of the Judges of the Court of Common Pleas,
An Accomplished Orator, Lawyer, and Poet.

—
The Members of the Oxford Circuit
Erected this Memorial
Of their Regard and Admiration
For their former Leader, Companion, and Friend.

SALARIES OF COUNTY COURT JUDGES.—Mr. Lowe asked the Secretary to the Treasury (in Parliament last May) if the Government had any intention of taking steps to equalize the salaries paid to County Court Judges?—Mr. Wilson said, the question alluded to by his hon. friend had for the last two years received great attention on the part of Government, and after the most careful consideration Government last year thought themselves justified, considering the great duties performed by some of the judges, in raising their salaries to the highest point allowed by the Act of Parliament. In supplying these increased salaries the whole of the funds placed at the disposal of Government had been exhausted. Applications had been received from other judges for an increase; but he saw no reason for complying with their request; and even if there was one, there were no funds which might be made available.

This is a complete misstatement. The grossest partiality has been shown, and judges who have incomparably more work than the favoured metropolitan judges remain at the lowest salaries.

APPOINTMENTS, &c.

Mr. Justice Maule, owing to ill health, has retired from the Bench, which has lost in him one of the acutest minds and best-read lawyers this century has produced at Westminster Hall. The vacant judgeship has been worthily filled by Mr. Willes, though he had not yet attained a silk gown. This gentleman is of Irish parentage, and a scion of Trinity College, Dublin. He has been long distinguished for his abilities as a lawyer, and his appointment is wholly free from the taint of nepotism and jobbery so unfortunately rife. Mr. Justice Willes has gone the Midland Circuit.

A NEW COUNTY COURT JUDGE CALLED IN 1810.—Mr. C. Temple, Q.C., who at one time had business on the Northern Circuit, but who has long retired from the toils of the profession, has to the astonishment of the profession been appointed County Court Judge for Northamptonshire, on the decease of J. Wing, Esq., aged 41. When will Mr. Temple retire with his pension?

Mr. Phinn, Q.C., has been appointed Secretary to the Admiralty, and retires from the profession and political life for a post purely official.

Mr. W. Atherton, Q.C., is appointed to the office of Judge-Advocate of the Fleet, as well as counsel to the Admiralty, vacant by the resignation of Mr. Phinn.

The Recordship of Devonport, vacated by the appointment of Mr. Phinn to the Admiralty, has been given to Mr. C. Saunders, of the Western Circuit, who was backed by no influence. He had the place simply because he was a fit man for it.

The new Chief Justiceship of the island of Corfu, involving every kind of judicial function, has been conferred, by Lord John Russell, on a Mr. Franklin Lushington, who was called to the Bar in 1853, and is almost wholly without practice.

NEW QUEEN'S COUNSEL.—Mr. Bovill, of the Home Circuit; Mr. Pickering, Mr. J. Wilde, and Mr. Overend, of the northern; and Mr. Whitmore, of the Oxford Circuit, have been sworn in as her Majesty's counsel.

TRINITY TERM, 1855.—Public Examination of the Students of the Inns of Court, held at Lincoln's-inn Hall, on the 18th, 19th, and 21st days of May, 1855. The Council of Legal Education have awarded to

John P. O'Hara, Esq., student of Gray's Inn, a studentship of fifty guineas per annum, to continue for a period of three years.

Charles A. Holmes, Esq., student of the Inner Temple, a certificate of honour of the first class.

John Pym Yeatman, Esq., student of Lincoln's Inn; Charles Fitzwilliam Cadiz, Esq., student of Lincoln's Inn; Edward Dundas Holroyd, Esq., student of Gray's Inn; Samuel Bruce, Esq., student of the Middle Temple; Andrew Steinmetz, Esq., student of the Middle Temple; Edward Howley, Esq., student of the Middle Temple; Frederick Hyman Lewis, Esq., student of the Inner Temple; Henry Rutherford, Esq., student of the Middle Temple; W. Algernon Slade Gully, Esq., student of the Inner Temple; William Patchett, Esq., student of the Inner Temple; and Henry Conington, Esq., student of Lincoln's Inn, certificates that they have satisfactorily passed a public examination.

By order of the Council,

(Signed)

EDWARD RYAN,

Chairman (pro tem.)

Council Chamber, Lincoln's Inn, 24th May, 1855.

LEGISLATION.

THE Bills of Exchange Bill (introduced by Mr. Keating, Q.C.), as amended by the Commons, has been accepted by the Lords. But Lord Brougham protests against the alterations that have been made in it. It will, therefore, become law. It facilitates judgment upon bills, and prevents vexatious defences.

INSOLVENCY AND BANKRUPTCY (SCOTLAND).—A Bill to consolidate and amend the laws of Scotland regarding bankruptcy and insolvency has been brought in by the Lord Advocate and Sir G. Grey. It contains 178 clauses, mostly relating to matters of detail. The Acts of the 54 Geo. 3, c. 137, the 2 & 3 Vict. c. 41, and the 16 & 17 Vict. c. 53, are repealed. It is proposed that the Act shall come into operation on the 1st of November, 1855.

THE Testamentary Jurisdiction Bill is withdrawn for the session.

QUALIFICATION OF JUSTICES OF THE PEACE.—A Bill, prepared and brought in by Mr. Colville, Viscount Emlyn, and Mr. Ker Seymour, amends the laws relating to the qualification of justices of the peace. It repeals the whole of the existing Acts. No person shall be capable of being a justice of the peace, unless he be qualified—1. by possessing an estate in land within England and Wales for his own use and benefit of the clear yearly value of 100*l.*; or, 2. by possessing a personal estate of 300*l.*; or, 3. by possessing a clear yearly income of at least 300*l.*, derived from a Government office or pension; or, 4. by possessing more than one of the several kinds of property hereinbefore mentioned, all amounting in the aggregate to the clear yearly value of 300*l.* A declaration of their qualification must be made by the justices of the peace, and any person guilty of making a

false declaration, will be held to have committed a misdemeanour. No qualification by estate shall be required of peers of Parliament, privy councillors, justices of either bench, or barons of the Exchequer, eldest sons of peers, or eldest sons of persons capable of being elected county members. The following persons will be qualified by office, viz. :—Officers of the Board of Green Cloth, Heads of Colleges, Vice-Chancellors and Mayors at Oxford and Cambridge, judges of County Courts, Commissioners of the Navy, Under-Secretaries of State, and the Secretary of Chelsea College, &c. Attorneys, solicitors, and proctors are especially disqualified. This Bill has been already withdrawn.

CRIMINAL JURISDICTION.—The Lord Chancellor announced the immediate introduction of a measure for increasing the number of Assizes and Quarter Sessions; but the Bill for extending the power of summary jurisdiction in cases of petty larceny renders it unnecessary, for the work will be thereby diminished, and the former is at present a dropped measure, though the latter will probably pass.

THE Executor and Trustee Companies Bill has passed the House of Commons, almost without an obstacle.

NEW ACT FOR THE EDUCATION OF POOR CHILDREN.—It is enacted that poor-law guardians may grant relief to poor persons, lawfully relieved out of the workhouse, to provide education for any child of such person, between the ages of four and sixteen, in any school to be approved of by the guardians, for such time and under such conditions as the guardians shall see fit. The Poor-law Board may issue orders to regulate the proceedings of guardians. "It shall not be lawful for the guardians to impose as a condition of relief that such education shall be given to any child of the person requiring relief." The cost of relief is to be charged in the same account as the other relief. Further, the Act provides that orphan and deserted children may be educated in the manner prescribed. The Act has immediate operation, but will prove nearly a dead letter.

LORD ST. LEONARD'S Bill for the better Protection of Purchasers against Judgments, *Lis pendens*, and Life Annuities, has passed both Houses.

THE Lunacy Regulation Act, 1853, has been introduced by Lord St. Leonards, and has passed. It is to authorize the Lord Chancellor, in matters of lunacy, to empower committees of estates to grant leases binding on issue, or remaindermen.

THE Lord Chancellor has presented a Bill to the House of Lords to make further provisions for the more speedy and efficient despatch of business in the High Court of Chancery, and to vest in him the ground and buildings of the said Court, situate in Southampton-buildings, Chancery-lane, with powers of leasing and sale thereof.

MR. J. G. PHILLIMORE has again introduced his Bill for the appointment of Public Prosecutors. The committee have seen no

reason to change the unfavourable opinion they expressed last year of the principle of this measure, and there is no doubt of its rejection.—Mr. R. Phillimore has succeeded in passing through the House of Commons a Bill for Abolishing the Jurisdiction of the Ecclesiastical Courts in England and Wales in suits for Defamation.

MR. HEYWOOD and Mr. Headlam have brought in a Bill to Legalize Marriages with a Deceased Wife's Sister, or a Deceased Wife's Niece, which will scarcely pass.

CALLS TO THE BAR.

MIDDLE TEMPLE, MAY 6.—Charles Boulnois (certificate of honour), LL.B., London University; Fitzgerald Lockhart Ross Murray; Robert Miller; Robert Scott, London University; and John Martin; Edward Howley, Henry Gillett Gridley; Henry Rutherford (cert.); Robert Mortimer Montgomery; Andrew Steinmetz (cert.), and Joseph Park, Esqrs.

INNER TEMPLE.—Walter Robinson, Thomas Arthur Farrell, Bernard Gustavus Norton, Peter Rothwell Crook, Charles Ierom Murch, B.A., James Scott Ogle, B.A., Benjamin Henry Walpole Way, John Boyd Kinnear, Henry Bret Ince, James Mackonochie, George Taddy Tomlin, William Reynold Deire Salmon, Gregory Charles Paul, B.A., and William Patchett, B.A., Esqrs.

LINCOLN'S INN.—Francis William Everitt Stiffe, William Torrens McCullagh, Robert Spencer Borland, Henry Scarth, Philip Lutley Sclater, William Angell, Charles Fitzwilliam Cadiz, Frederic William Earle, John Pym Yeatman, George Udny, Joseph Keech Aston, and Charles Ambrose Lionel Lorenz, Esqrs.

GRAY'S INN.—Edward Dundas Holroyd, M.A., and Charles Heywood, Esqrs.

CALLS TO THE IRISH BAR.—The following gentlemen were, on the 30th May, called to the Irish Bar:—W. Woodlock, son of W. Woodlock, solicitor; Philip Keogh, of Gervagh, in the county of Sligo; F. T. Longworth Dames, Greenhill, in the King's County; C. J. Ferguson, Prospect, Mullingar; William O'Brien, of Cork; John J. Kirby, of Fermoy; William Anderson, of Dungarvan, Esqrs.

NECROLOGY.

JOHN VENN PRIOR, Esq., of the Equity Bar, was killed by a fall from a strange horse he had accidentally mounted as his own, in Hyde Park last month. Sir William Page Wood spoke of him from the bench as "one who has been so recently removed from us, and whose loss we so deeply deplore," and as one for whom "none will feel a more deep or lasting regret than those who were acquainted with him professionally, and who will always look back with admiration on his ability and integrity, and with affection on his gentleness and courtesy."

April.

- 20th. FOULHES, Edward, Esq., solicitor, Manchester, aged 84.
 21st. CLOWES, William, Esq., barrister, London, aged 65.
 26th. JONES, Frank Jones Walter, Esq., barrister, London, aged 47.

May.

- 2nd. SMART, William, Esq., solicitor, London, aged 73.
 8th. TEARNHEAD, Peter, Esq., solicitor, Oakham, aged 68.
 19th. PINKETT, William, Esq., solicitor, Sussex, aged 25.
 — BEDWELL, F. Robert, Esq., registrar of the Court of Chancery, aged 51.
 23rd. CUXWALL, Alfred, Esq., barrister, Devizes, aged 43.

June.

- 2nd. PARTRIDGE, Samuel John, Esq., barrister, Reading, aged 37.
 4th. PIERCEY, Samuel, Esq., solicitor, London, aged 54.
 13th. BRIETACHE, Charles Ware, Esq., second judge, Calcutta, aged 56.
 16th. SIMPSON, James Brown, Esq., town clerk, Richmond, Yorks., aged 51.
 17th. PRUDENCE, William, Esq., solicitor, Clapham, aged 66.
 18th. WING, J. W., Esq., County Court judge, aged 41.
 28th. GROGAN, Edward Carey, Esq., solicitor, Taunton.

July.

- 3rd. HOLMES, Joseph Hanby, Esq., town clerk, Bury St. Edmunds, aged 41.
 4th. PHILLIPS, Revell Henry, Esq., barrister, London.
 7th. ELLIS, William Joyner, clerk of the peace, Gloucester.
 9th. WIGHTWICK, Humphrey, Esq., solicitor, Ramsgate, aged 73.
 11th. COLLISON, William, Esq., clerk of assize, Midland Circuit, aged 52.
 15th. WINTER, Robert, Esq., solicitor, London, aged 64.

ERRATUM.—At page 384 of last number of the *LAW MAGAZINE*, in line 8 from bottom, for “[to make a rate for repairs of the church]” read [to repair the church].

List of New Publications.

Bankruptcy—Tables of Costs in Bankruptcy, and New Orders, June, 1855. 12mo. 3s. 6d. cloth.

Brougham—The Speech of Lord Brougham in the House of Lords on Criminal Law Procedure, March 23, 1855; with the Resolutions of the House of Lords. 8vo. 1s. sewed.

Darling—A Treatise on the Administration of Trust Funds; with the Trustee Relief Act. By J. Darling, Esq., Barrister. 8vo. 7s. 6d. cloth.

Davidson—Davidson's Precedents and Forms in Conveyancing. Second Edition. By C. Davidson and T. C. Wright, Esqs., Barristers. Vol. I. Royal 8vo. 28s. cloth.

Davis—A Manual of the Practice and Evidence in Actions and other Proceedings in the County Courts; with the Statutes and Rules. By J. E. Davis, Esq., Barrister. Second Edition. Post 8vo. 15s. cloth.

Glen—The Small Tenements' Rating Act, and the Vestry Act, 1850, 13 & 14 Vict. cc. 57 and 99; with Introduction and Notes. By W. C. Glen, Esq., Barrister. Third Edition. 12mo. 2s. boards.

Glen—The Poor Law Guardian: his Powers and Duties in the Right Execution of his Office. By W. C. Glen, Esq., Barrister. 12mo. 3s. 6d. cloth.

Hough—Precedents in Military Law, including the Practice of Courts-Martial—the Mode of Conducting Trials—the Duties of Officers at Military Courts of Inquests, Courts of Inquiry, Courts of Requests, &c. By W. Hough, Lieutenant-Colonel. 8vo. 25s. cloth.

James—The County Voter's Manual and Guide to the Registration Courts and Elections; with Practical Directions to Overseers, &c. By W. A. James. 12mo. 2s. sewed.

Jarman—A Treatise on Wills. By T. Jarman, Esq., Barrister. Second Edition. By E. P. Wolstenholme and S. Vincent, Esqrs., Barristers. 2 vols. royal 8vo. £3. 3s. cloth.

Juridical—Papers read before the Juridical Society. 8vo. 3s. 6d. sewed.

Kerr—An Action at Law: being an Outline of the Jurisdiction of the Superior Courts of Common Law; with an Elementary View of the Proceedings in Personal Actions and in Ejectment. By R. M. Kerr, Esq., Barrister. Second Edition. 12mo. 10s. boards.

Lees—Laws of Shipping and Insurance; with an Appendix containing the Merchant Shipping Act and Recent Statutes, together with a Copious Index. Seventh Edition, enlarged and adapted to the present State of the Maritime Law. By James Lees. Crown 8vo. 10s. 6d. cloth.

Lorenz—Select Thesis on the Laws of Holland : being a Commentary on Hugo Grotius' Introduction to Dutch Jurisprudence. Translated from the German Latin. By C. A. Lorenz. Crown 8vo. 10s. 6d. cloth.

Paterson—The Mercantile Marine Laws, 1855 ; with Notes and Index. By W. Paterson, Esq., Barrister. 12mo. 7s. 6d. cloth.

Pratt—Income-Tax Acts ; with a full Analysis of the different Acts, also Cases, Explanatory Notes, and a Copious Index : being a Supplement to Tidd Pratt's Property-Tax Act, 1842. By W. T. Pratt, Esq., Barrister. Second Edition. 12mo. 4s. boards.

Roche—The Transfer of Land and Judicial Registration. A Letter to Sir Richard Bethell, M.P., her Majesty's Solicitor-General, on the Defects of the Present System of Transferring Land. By C. M. Roche, Solicitor. 8vo. 1s. sewed.

Ross—Leading Cases on the Commercial Law of Scotland, England, and Scotland. By G. Ross, Esq., Advocate. Vol. II. Royal 8vo. £1. 17s. 6d. cloth.

Shelford—The Law relating to the Probate, Legacy, and Succession Duties, including all the Statutes and the Decisions on those Subjects ; with Forms and Practical Directions. By L. Shelford, Esq., Barrister. 12mo. 12s. cloth.

Smith—The Law of Contracts, as contained in a Series of Lectures delivered at the Law Institution. By the late John William Smith. The Second Edition. By J. G. Malcolm, Esq., Barrister. 8vo. 16s. cloth.

Smith—The Practice of the Court of Chancery ; with Forms and Bills of Costs : intended as a Fifth Edition of a "Treatise on the Court of Chancery," and a Second Edition of "Hand-Book of Chancery Practice." By J. S. Smith, Barrister. 8vo. 25s. cloth.

Taylor—A Treatise on the Law of Evidence, as administered in England and Ireland ; with Illustrations from the American and other Foreign Laws. Second Edition. By J. P. Taylor, Esq., Barrister. 2 vols. royal 8vo. £2. 16s. cloth.

Warren—Blackstone's Commentaries, systematically abridged and adapted to the Existing State of the Law and Constitution. By S. Warren, Esq., Q.C. Post 8vo. 18s. cloth.

Wheaton—Elements of International Law. By H. Wheaton, LL.D. Sixth Edition, with the last Corrections of the Author, Additional Notes, and Introductory Remarks, and a Sketch of the Author's Life and Diplomatic Career. By W. B. Lawrence. Royal 8vo. £1. 11s. 6d. cloth.

THE
LAW MAGAZINE;
OR,
QUARTERLY REVIEW OF JURISPRUDENCE.

No. CIX.

ART. I.—LIMITED LIABILITY.

[This article was written before the Limited Liability Bill of last Session had received the sanction of Parliament; but as it contains an epitome of all the arguments for and against that measure, and also for and against the Partnership Amendment Bill, which has not passed into a law, we now insert it with a few slight alterations, adding some further remarks upon the provisions of the Limited Liability Act itself.—ED.]

WE revert to this subject, in accordance with the promise which we made in a former number, though it is now pretty well used up by the host of essayists and pamphleteers who have written upon it, and has provided matter for numerous parliamentary reports and parliamentary debates. It will not be without utility, however, to take a review of the arguments which have been commonly used in its discussion, two bills bearing upon it having been recently before Parliament, one of which has become the law of the land. After all the discussion which the subject has received, we are not satisfied that its real bearings are yet generally understood, although several blue books, containing a vast amount of useful and well-digested matter, and some very able treatises on it, have been given to the world within the last twenty years.

In 1837, Mr. Bellenden Ker made a report on the Law of Partnership, which was printed by order of the House of Commons. That report contains a great deal of valuable information, and is particularly interesting at the present moment, as showing that most of the difficulties which have arisen out

of the modifications subsequently made in the Law of Partnership, by the Joint Stock Registration Act, were then indicated; as they were also in the first report of the select committee on Joint Stock Companies, which was assumed as the basis on which the Act itself was framed. The principal evils of the Law of Partnership, as it then stood, Mr. Ker classed under three heads: 1st. Those arising from the difficulty of suing and being sued; 2ndly. Those arising from the difficulties which occur to partners from suing *inter se*, more especially in reference to a resort to Courts of Equity in partnership disputes, and agreements to refer to arbitration; and lastly, those arising from the rule that any person taking an interest in the profits becomes liable as a partner. The first two evils were to a considerable extent remedied by the Joint Stock Companies' Acts. The latter was no doubt intended to be dealt with in a similar spirit in the Joint Stock Companies' Registration Act; but all these attempts at alteration or improvement have, until the recent session of Parliament, been confined to public companies, though the policy of limiting the liability of partners in private trading partnerships has long occupied no small share of public attention. There is no denying this fact, that public opinion has undergone a considerable revolution in regard to the latter subject within the last few years. The old common notion, and the opinion of our ablest judges, was, no doubt, that any limitation of the liability of a partner in trade was unjust in principle, and would be impolitic in practice. "With respect," says Mr. Ker, "to the difficulties arising from the liability incurred as partner by a share of the profits, the propriety of any legal enactment on this head seems, from the opinion of the gentlemen who had been examined, to be very questionable; those in favour of it admitting the necessity of introducing such qualifications as would guard it from being made use of as a means of evading the great principle of the Law of Partnership, and at the same time the difficulty of accomplishing it; and on the other hand, the majority of the opinions, both commercial and legal, are opposed to it." Yet in the same report, we find it stated, "that with respect to the working of the law in France and New York, as far as informa-

tion has been obtained, it appears to be considered beneficial; and certainly, as regards the French law, the cases which are reported do not afford evidences that this branch of the Law of Partnership furnishes any peculiar facilities for committing frauds on creditors. In France, according to the opinion of some well-informed merchants, it is very useful, as affording the means of directing to commercial enterprise much capital, which otherwise would not be so employed; as affording the means of bringing forward intelligent and skilful persons, who have not capital to enable them to enter into commercial speculation; and as enabling a retiring trader to leave in the business a portion of his gains, and thereby continue the credit of the house to his successors, which the retiring partner might not be inclined to do, if his whole fortune were to be liable to the partnership engagements. In New York it is understood that the same effect is produced."

It would be difficult now to state the usual arguments in favour of limited liability more strongly or tersely than they are here put; and yet the select committee of 1843—with this report before them, and a great mass of evidence to support the views maintained in the extract which we have just given—were so chary of giving expression to what appears to have been the conviction of the majority, that they "forbear to express an opinion, because, though highly worthy of consideration, those subjects do not appear to fall within the scope of the reference which was made to them." We next find the subject partially investigated by the committee appointed in 1850 by the House of Commons, to inquire into the subject of the investments of the middle and working classes; and their report, without pledging the committee to any positive opinion, recommended that charters of limited liability, for useful undertakings, should be granted by the Crown with due caution, at a moderate cost. This, perhaps, is the first decided intimation of opinion on the subject which we find in any of the parliamentary reports relating to the question of limited liability.

Mr. Slaney's committee was appointed in 1851 to consider the Law of Partnership, and the expediency of facilitating the limitation of liability, *with a view to encourage useful enterprises,*

and the additional employment of labour ; and as we are now glancing at the development of opinion on the subject, in a kind of historical manner, it may not be out of place to state shortly the conclusions at which that committee arrived, as stated in its report.

Having considered the Law of Partnership as then (in 1851) existing—viewing its importance in reference to the commercial character, and rapid increase of the population, and prosperity, of the country—they recommended the appointment of a commission to consider the whole subject, “ especial attention being paid to the establishment of improved tribunals to decide claims by and against partners, in all partnership disputes ; and also to the important and much controverted question of limited and unlimited liability of partners.” They further recommended an alteration in the usury laws, and that “ power be given to lend money for periods not less than twelve months, at a rate of interest varying with the rate of profits in the business in which such money may be employed ; the claim for repayment of such loans being postponed to that of all other creditors ; that in such case, the lender should not be liable beyond the sum advanced ; and that proper and adequate regulations be laid down to prevent fraud.” The *mode* of granting immunity from unlimited liability advocated by this committee was similar to that suggested by the committee on investments, viz. a greater facility in the obtainment of charters of incorporation ; and that power should be conferred upon traders to borrow capital, without risk to the lender, beyond the amount of the sum advanced ; and they went so far as to express their conviction that it was no less “ consistent with the spirit of recent legislation than conducive to the public advantage, and the promotion of legitimate trade, to relax any restraints,” which existed on the free action of individuals in the application of capital, due regard being paid to the importance of preventing the acquirement of undue or undeserved credit, or giving encouragement to ignorant or reckless speculation.

The draft of the report proposed by the chairman, Mr. Slaney, contained the recommendation, “ 1st. That charters of limited liability, for useful local enterprises, subject to certain rules to

be laid down, should be granted at much less cost, and with much greater facility, than has hitherto been the case. 2ndly. That the law of limited liability of partners, as in usage abroad, should, after due regulations, be adopted here, but not extended to banking, mining, insurance, foreign trade, or other enterprises of a like speculative or uncertain character."

It may be seen, by the slight chronological sketch we have given of the opinions entertained and expressed from time to time by parliamentary committees, that the leaning towards limited liability has been more and more marked, as the subject received further investigation. This of itself will be no trifling argument with those who have not time, or who do not care, themselves to enter into all its bearings. It is also worthy of remark that, in no case, do we find a committee expressing an opinion hostile to the limitation of liability. Mr. Bellenden Ker, in his report of 1837, says that, "*from the opinion of the gentlemen who had been examined,*" the propriety of an enactment for that purpose appeared to be very questionable; but yet Mr. Ker's own conclusion appears to have been decidedly favourable to such a measure. The committee of 1843 simply "forbear" to express an opinion, though the minutes of evidence taken before them disclose many arguments in favour of limited liability, which must have gone far to shake the preconceived notions of those who were adverse to such an enactment. The committee on investments (of 1850) give no opinion on the abstract question, whether the unlimited liability of partners should remain unchanged or not; but their recommendation that charters should be granted at a moderate cost shows the tendency of their minds, and their disposition, at all events, to greatly increase the number of companies or partnerships possessing this immunity. Mr. Slaney's committee goes still further; for, besides adopting the recommendation of its predecessor as to charters, it boldly recommends the limitation of the liability of *private* partners in certain specified cases. This brings us down to the Commission appointed to inquire into the Mercantile Laws and the Law of Partnership, whose first report was printed last year. Upon the question which we are now discussing, the report says, "It is difficult to say on which

side the weight of authority in this country preponderates. The opinions received from foreign countries preponderate in favour of limited liability; but many of the foreign correspondents, while bearing testimony to the beneficial operation of the law as to partnerships with limited liability in their countries, suggest that it *may*, nevertheless, well be, that the circumstances of the trading interests in the United Kingdom *may* give it a very different operation here." The commissioners considered that the proposed limitation of liability would not operate beneficially on the general trading interests of this country; but they were favourable to the extension of cheap charters. As to the expediency of adopting the suggestion of Mr. Slaney's committee (see *ante*, p. 218), viz., that persons should be enabled to lend money at a rate of interest varying with the rate of profits, the commissioners were not agreed in opinion; and we accordingly find that Lord Curriehill, Mr. Bramwell, Mr. Anderson, Mr. Hodgson, and Mr. Slater, stated their opinions on the subject separately. These opinions are to be found in an appendix to the report. No where else perhaps has the subject been so well discussed as in the Blue Book to which we at present refer. Indeed, it would be difficult to suggest any argument, on either side, which is not to be found in the papers supplied by the learned commissioners; and it is no doubt very much to be attributed to the unanswerable arguments therein contained, as well as to the mass of evidence published by the commissioners, that we have had two bills, embodying and enforcing the principle of limited liability, recently brought before Parliament.

It may be asked, why have committees of the House of Commons, and commissioners appointed by the Crown to investigate this subject, been so slow to acknowledge the merits of limited liability, if the weight of evidence has always preponderated so greatly in its favour? Why did Mr. Bellenden Ker rely so little upon his own judgment, and so much upon the vague general opinions "of the gentlemen who had been examined?" Why did committees of the House of Commons timidly forbear to express an opinion upon a question so intimately connected with the subject which had been referred to them by Parlia-

ment? Why are committees and commissioners so unanimous in advocating the great extension of cheap charters, as the best way of meeting the growing feeling in favour of *commandite* partnerships? Why are they so easily satisfied of the propriety of thus multiplying exceptions to the rule of unlimited liability—exceptions, too, let it be remembered, which are based upon no principle of jurisprudence or political economy, but lie altogether at the mercy of an irresponsible minister or board? To any one who will take the trouble of reading all the documents to which we have here referred, the answer will be obvious enough. It is to be found epitomised in the laconic apophthegm of Mr. Bellenden Ker, in reference to this very question, “all change is an evil,” which may be taken as a free translation of the well-known *Nolumus leges Angliæ mutari*. Mr. Ker has subsequently said that all he meant by this sententious bit of wisdom was “that all change arising from the introduction of a new law must bring some evil; for either it is impossible so to express complex laws as to prevent doubt or difficulty, or our mode of framing such laws is eminently unsuccessful; and hence, though there may be a *balance of good*, there always must be some evil accompanying the change:” and then Mr. Bellenden Ker, like a true Briton, at once seeks refuge in the sanctuary of one of our *old* institutions—the Board of Trade, in the “routine” of which, it ought not to be forgotten that Mr. Ker himself enjoys no unprofitable position. Great is Diana of the Ephesians, and particularly great in the eyes of one Alexander the coppersmith! We are a people notably hostile to organic change, especially in our laws. We will modify, we will amend, we won’t object to slight alterations in our law; but you must not ask us to confess that we have been entirely wrong for centuries. The offensive suggestion is at once met by an appeal to our national prosperity, which many good people suppose is proof positive that everything is just as it ought to be. Then there is no doubt that Lord Eldon’s famous axiom, that every partner in trade is “liable to the last acre and the last shilling in his possession,” has had no trifling effect in producing a conviction in the public mind (which certainly did exist to a remarkable extent) that—“in the nature of

things"—such was the true and legal condition of partnership, without which commerce could not be carried on, or mercantile credit be maintained, for a single year. It became very common to hear tyros in the science of political economy speak of unlimited liability being, to use the cant phrase, "the natural state of things," and limited liability "the unnatural state of things." That such a notion was entertained, even among the better informed, it may be sufficient to refer to a question put by Mr. J. A. Smith to Mr. J. G. Phillimore,¹ in Mr. Phillimore's examination before the committee of 1851:—Mr. J. A. Smith (Q. 73). "Would not the *natural state of things* be unlimited liability, and the *unnatural state* of things limited liability?" Again, in his examination of Mr. Commissioner Fane: Mr. J. A. Smith² (Q. 523). "Why do you think that limited liability is a more natural state of things than unlimited liability?" and (Q. 524). "What I meant to ask was this: why do you consider it a more unnatural state of things for a man to be liable fully for the consequences of his acts, than to have those consequences limited by an Act of the Legislature?" Mr. Sweet also, in his *Treatise on Limited Liability*, gives us as the first general head of the subject—"Liability a NATURAL consequence of sharing profits." The learned writer must surely use the word "natural" here in a non-natural sense, as the Oxford Tractarians would say; for in what intelligible sense liability can be the natural consequence of sharing profits it would be difficult to predicate.

We do not stop now to discuss the fallacy which lies at the root of this notion of a natural and an unnatural state of things in reference to the subject at present under discussion. We merely give these extracts by way of an illustration of the views with which the subject came to be regarded even by persons of considerable intelligence. Unlimited liability was supposed to be the only true and safe condition of trading partnerships, when viewed in the light of political economy; and that such was the legal status of trading partners was generally *assumed* to be the old common law of the land. How far this was an assumption, Mr. Commissioner Fane, in his most valua-

¹ Report on the Law of Partnership, p. 12.

² Page 71.

ble evidence before the committee of 1851, shows us clearly:—"In the early part of my professional life," says Mr. Fane, "circumstances induced me to study the Law of Partnership, and I found this strange provision in it; I was so startled and amazed, that I set about tracing it to its source, and then I discovered that it had, properly speaking, no foundation at all. I traced it to a case decided in 1793, on the alleged authority of a case decided in 1775, which last not only did not affirm it, but actually negated the liability of the alleged partner. The case in 1775 was *Grace v. Smith*, Blackstone's Reports, 998. There Grace endeavoured to make Smith, who had retired from a partnership some years before, responsible for a subsequent debt of the partnership, on the ground that he on retiring had stipulated for a share of the profits. The counsel who argued for the plaintiff, to support his argument, took from his pocket what, in the language of our profession, is called pocket-pistol law, that is, a manuscript account of an unreported case, which he said had been decided a few months or weeks before by Lord Mansfield, *Bloxham v. Pell*, in which Lord Mansfield had decided in a similar case, that the retired partner was liable. This argument and case, however, produced no effect, for Chief Justice De Grey, and the three other judges, held that the defendant was not liable. Similar attempts to make persons responsible for debts, as dormant partners, were repeated; in 1780, in *Hoare v. Dawes*, Douglas's Reports, 371; and again in 1788, in *Cooke v. Eyre*, 1 H. Blackstone, 37,—but they failed; nor was it till 1793 that the doctrine was established,"—in the case *Waugh v. Carver*, 2 H. Blackstone, 235, professedly upon the authority of *Grace v. Smith*. Since 1793 there have been a number of decisions more or less contradictory, many of them assuming that the test laid down in *Grace v. Smith*—that whoever takes part of the profits thereby takes part of the fund which is the proper security to the creditors for their debts—is based upon sound principles of political economy, and supported by every consideration of policy and common justice. Nevertheless, Lord Curriehill observes,¹ "that in his opinion there does not appear to be in our existing laws any rule to prevent a

¹ Report of Mercantile Law Commission, Appendix, p. 11.

company [partnership], in its contracts with other parties, to stipulate that some or all of its partners, and their funds, other than those embarked in the partnership as its stock, shall not be liable for the debts incurred by the partnership under these contracts. If a partnership should prevail on other parties to contract with it on such a footing, there is no reason why such a condition of the contracts should not be effectual. Nor would the validity of such a stipulation depend upon one of the contracting parties being a partnership ; there being no reason why parties agreeing to such an immunity in favour of even an *individual* customer should not be bound by their contracts. If contracts of this kind be rarely heard of, this is not because they require legislative interference to render them legal, but because few persons will sell, lend, or otherways dispose of their funds on such terms."

It is worthy of remark that many of the opponents of limited liability make what they conceive to be a telling argument out of the supposition that few persons would credit a partnership so constituted ; and say there is nothing to prevent them from doing so now, if they are so disposed : while a numerous class of advocates *on the same side*, adopting the other extreme, cry out, "If you reverse the present rule of law as to liability, you open the floodgates of fraud, and ruin the credit of the country. So seductive are the allurements of trade, that thousands of fraudulent firms will obtain unlimited credit from the simple and unsuspecting. It will be an almost universal breaking down of the barriers of English commerce, and terminate in a paroxysm of wild speculation," &c. &c. One might suppose, after the perusal of a few of these proleptical jeremiads, that the moneyed men, manufacturers, and others, who would be likely to deal with those terrible *commandite* firms, were a multitude of Moses Primroses, who should never be allowed to go to fair or market without some statutable grandam to insure their safe return. It seems never to have occurred to the minds of these dolorous prophets, that where men are determined to be foolish, an Act of Parliament cannot do much to prevent them. Were there no bubble companies after the Bubble Companies Act? Did the Usury Act extinguish the practice of usury? Has the

Joint Stock Companies' Registration Act put an end to, or in any way diminished the number of, "West Middlesex and General Annuity" Associations? On the other hand, did the Anonymous Partnerships Act for Ireland (21 & 22 Geo. 3, Ir. Stat.) lead to any excessive and rash speculation in that country? What tremendous evils have been caused by Mr. Slaney's Act (15 & 16 Vict. c. 31), which lets loose the principle of limited liability into the most dreadful of all regions, viz. amongst the "dangerous" classes? We can afford, then, to regard with indifference all these distressing predictions of men, the like of whom turn up in the discussion of every question, of whatever kind or nature soever.

The truth is, the change in the law, advocated by those who are in favour of limited liability, is not so very sweeping after all, either in principle or in effect. According to the law as it is at present, the only thing that stands in the way of a partner's limiting his liability is the difficulty of proving that parties dealing with the firm were aware of and acquiesced in his declaration that he would not be liable for the debts of the firm beyond a certain amount. It is merely a question of notice and of evidence. Instead of calling the bill lately before Parliament a Bill for the Limitation of the Liability of Partners in Trade, it might perhaps be more justly intituled a bill to declare what shall be sufficient evidence of contracts between trading partners and their creditors, to restrict the liability of certain of the former. Under the proposed act, as under the old law, all ordinary partnerships would have the attribute of the unlimited liability of all the partners. In that respect the law would remain unchanged. There has been and there would be nothing to prevent a firm and its creditors from making a valid agreement, that a partner of the firm should be liable to the creditor for the partnership debts to a certain amount, and no further. The practical obstacle to such contracts becoming common was the difficulty—indeed, in many instances the impossibility—of a firm contracting in such a manner with all its creditors. Where this difficulty does not exist, we have *already* limited liability, not only in theory of law, but actually carried out into practice. Thus, in a number of insurance offices, a condition of the policy

of insurance is that the assured can only look to the funds of the company, and not to individual shareholders, in the event of his having a claim in respect of his policy. Here the contract being always in writing, there is no difficulty in proving the real nature of the agreement.

In *Gallway v. Smithson*, 10 East, 264, the action was upon a promissory note, signed by a partner in a brewery for the firm; to which the defendant pleaded that before the plaintiff took the note in question, he had notice of an advertisement then recently inserted in a newspaper by the defendant, wherein he warned all persons not to give credit to his partner on his (the defendant's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. It was argued by counsel for the plaintiff, that the declaration of the defendant, that he would not be liable for the contracts of his partners on their joint account, was not sufficient to rid him of his legal responsibility; on which Le Blanc J. observed, "Can an *assumpsit* be raised by one man's discharging the debt of another who desires him not to do it upon his credit?" And Lord Ellenborough held that the plaintiff could not recover in defiance of the notice previously given to him in the advertisement. The implied authority of one partner to bind another may always be rebutted by express notice; and thus we find that in many of the arguments which have been used by the opponents of limited liability, there is one element, at all events—we mean the assumption regarding the common law—which is altogether to be rejected. If there be no stipulation to limit liability, it is unlimited: if there is an agreement, and you can prove it, then the law will not interfere with the agreement, but will uphold it.

The stock argument of all the advocates of unlimited liability—an argument which they seem to think smacks of blunt honesty, and which no doubt has for many years stuck in the throat of John Bull—is that whoever participates in the profits of a business must in return contribute to its losses. To have the chance of being gainer you must run the risk of being loser. There is such a natural antithesis between profit and loss—such a ready association of these ideas by reason of the permanence

and force of the contrast—that most people are caught by the semblance of logic. If the proposition, however, were strictly expressed, it would savour more of inequity than justice. It seems fair enough to say, that you may win, you must also take the chance of losing; if you diminish the profits, you must contribute to the losses: but it is a very different thing to say, that you may win something, you must run the risk of losing everything; if you take a share of the profits, you will become liable to pay the whole of the losses. Moreover, you may diminish the profits as much as you can, in any other character but that of partner; or indeed as partner to all intents and purposes, if you get at the other side of the “very thin” division which distinguishes legal partners from actual participators. Mr. Bramwell thus states and answers this time-honoured objection: “When stated with precision it seems to be this: that there is a natural justice in, or connexion between, buying goods and paying for them. I ask, why should a man who buys goods pay for them? Either he has undertaken to do so, or he has not. If he has, make him liable to the extent of his undertaking; to his last shilling and acre, if he has pledged them. But if he has not, if he has not undertaken at all, or if he has limited his liability, I not only see no reason why he should be called on to do that which he has not engaged to do, but I think it is a positive dishonesty to attempt to make him. I take the case of a dormant partner as an example: A has entered into partnership with B; he has engaged that B shall not pledge his credit; he has agreed to find certain capital; he has performed his engagement faithfully. C has sold goods to B; B’s fraud, folly, or misfortune, makes him insolvent. The existence of the partnership is discovered, and A is called upon by C, who had never heard of him, and never trusted him, to pay. This claim is, in my judgment, inconsistent with common sense and common honesty. Again, it is said, that as profits would have gone to pay a debt, he who takes them ought to pay it. If he did not undertake to do so, why should he use a profit on a transaction with A to make good a loss on another with B?”

Participation of profits, no doubt, is the legal test of partner-

ship, and in the case of secret or dormant partners, it has been said that they ought to be liable equally with the open and ostensible partners, on the ground that they, by participation in the profits, take from the fund to which the creditor has a right to resort for payment. Lord Mansfield, in *Hoare v. Dawes*, Doug. 356, held that they should be so liable, "because they would otherwise receive usurious interest without any risk."

Whatever might have been the effect of this argument while the Usury Laws were in being, it will be admitted that since their repeal, it is greatly diminished. As long as they were in force, it was not competent to any man to lend money at an interest beyond a certain rate, and therefore it was then illegal to do what now is perfectly lawful—to advance money on loan, for the purposes of trade, at rates of interest calculated with a view to the varying profits of business. There is nothing in the law, at present, to prevent the fundholder from virtually participating in the profits of trade; and it matters little to the creditor whether the fund, out of which he is to be paid his demand, has been diminished by the high rates of interest paid by his debtor for the capital on which he traded, or by a division of profits, as such, with a third party who supplied the same.

The difference between interest and profit is, that one is fixed and certain; the other fluctuating and uncertain. In respect of the former, you have an absolute claim against the assets of the trader; the second is only contingent, and is itself liable. It has been said, indeed, that there is this further difference, that where you lend money, you have no right to exercise any control over the management of the borrower's business; but that a partner has the right of inspection of the accounts, and generally of interfering with the management of the concern. A partner, no doubt, by right of law, can inspect the accounts; but a lender may stipulate for the right; and so far as such inspection renders the security greater, he may, in most cases, have the security without any very ingenious contrivance on his part. A partner has not necessarily the right to control a business in such a way as he may think best for his security; a dormant partner frequently stipulates not to interfere in

the management of the affairs of the firm; but this objection, at all events, does not lie against a *commandite* partner, who can exercise no control whatever without thereby losing his immunity.

It is a mere anomaly of our law, then, which permits the money-lender to draw fifteen or twenty per cent., or as much more as he can get, out of the profits of a business, without any liability whatever on his part beyond the risk of losing his debt; but refuses the same or a much less benefit to a dormant partner, whose credit has been in no wise pledged, and who has never interfered in the conduct of the partnership affairs. Indeed, though the case were otherwise, and both stood upon the same footing as to the extent of their liability, there would still remain the important distinction between them—and properly so, it may be—that in the event of the insolvency of the concern, the former would come in as a creditor for his share in the division of the assets, while the latter would be postponed to all the creditors, and remain himself a debtor to them in the amount stipulated by him as a dormant partner.

There is, moreover, a practical fallacy in the objection with which we are dealing. It is a mistake to suppose that the rule is to give credit upon the faith of profits. Credit usually, indeed always, in regular mercantile transactions, is given *in respect of the capital, not of the profits*, which for the most part are expended in the maintenance of the firm, and contribute generally, but in a comparatively inconsiderable degree, to the stock of assets; and the capital is commonly contributed most largely by the dormant partners, and there can be no injustice to the creditor if it remain to the last fully liable to his demand.

It may be insisted that the respectability of the firm was a ground of credit, but surely nothing could have been staked upon the character of unknown persons; and if the ostensible partners—those whose personal reputation was the real ground of confidence—are liable to their last shilling and their last acre, there is no just reason for attempting to fasten liability upon those whose names were unknown—whose existence was unheard of—by the parties affecting to have been deceived.

Nor is the argument solely dependent for illustration upon

the case already adverted to, where money may be advanced on loan at an exorbitant rate of interest, and the fund to which the creditor has to look is proportionably diminished. There is also the case of annuitants and *quasi* partners, to which most of the foregoing remarks equally apply. It is no uncommon thing for a retiring partner to stipulate for an annuity of a fixed amount, in consideration of his relinquishing his share of profits; but suppose all parties would prefer his receiving an annual sum varying with the amount of profits, which for many reasons might be the most desirable proceeding, not only for the retiring, but also for the continuing partners, the law steps in to interfere, and says, "No; you A, for the consideration afore-said, may be secured by deed in an annuity of 500*l.* per annum (even though that be a sum larger than the whole firm had ever realized before); and you may do so, without the least liability to the creditors of the firm, though you take away more than the whole profits of the concern, and compel your former partners to fall back upon their own capital for their maintenance; nay, more, in the event of their insolvency, you may yourself come in as a specialty creditor of the first rank, being secured by a deed; but if you make your annuity in the least—no matter how remotely—contingent upon profits; if you even agree to receive a lesser sum, should the concern not realize sufficient in the course of any year to pay you; you are then a partner, and in the event mentioned, instead of being a favoured creditor, are at once transformed into a debtor, having, by construction of law, made yourself liable for the debts of your co-partners." In *Ex parte Wilson* (Buck. 48) a retiring partner stipulated with the continuing partners for an annuity of 50*l.* to himself, with remainder to his wife and children, but that in the event of the profits of his share not reaching that amount, then that it should abate proportionably, with a provision for an increase to 100*l.* if his share should amount in value to a certain specified sum. Lord Eldon held him to be a partner; the amount of the annuity being liable to fluctuate with profits. If the annuity was 100*l.* absolutely, the question would never have arisen. This case is in principle opposed to *Ex parte Waters*, 19 Ves. 461 (see *infra*, p. 232).

By *quasi* partners, we mean a class of persons that is becoming more numerous every day—men for whom ingenious lawyers have achieved what Parliament has been so tardy in attempting—who are really partners with limited liability, thanks to the subtle contrivance of conveyancers, who seldom are wanting in sufficient skill to relieve the public from mischievous interference and arbitrary legislation in their own department of the law. Sergeant Moore's well-known contrivance to defeat the Statute of Inrolments has not been without its rival in regard of ingenuity in modern times. The present instance may be considered as an equal triumph of subtlety. No other than Lord Eldon himself was the first to suggest a distinction in favour of the man who "stipulates, as the reward of his labour, that he shall have, not a specific interest in the business, but a given sum of money, even *in proportion to a given quantum of the profits*." "That (said the learned judge) will not make him a partner; but if he agrees for part of the profits, *as such*, giving him a right to an account, though having no property in the capital, he is, as to third parties, a partner." This distinction has been frequently characterised as "very refined" and "very thin" from the bench and in the text-books. To the ordinary reader, I have no doubt, it will appear very forced and absurd. What real difference is there between receiving a share of the profits, and a sum of money in proportion to the profits? And as to one having the right to an account, and the other not, the fallacy has been long since exploded; for it is perfectly plain that if one is to be paid in proportion to profits, it is just as necessary for him to have some means of discovering what the profits really are, as if, instead of his remuneration being proportionate to, it were an actual share of, profits, *as such*. Nor is the law, in respect of this subtle distinction, by any means consistent, for it is possible for a person to have a share in the profits of a concern (as profits) without being necessarily a partner: as in the case where one member of a mercantile firm assigns to a stranger all his profits in the concern. The assignee is not thereby made a partner; and in the case of the insolvency of the firm, instead of his being liable for all its debts, he comes in as one of its creditors

still further to diminish the fund from which he already may have largely subtracted. See *Ex parte* Cooper, 2 Mont. Deac. & De G. 14. A clerk who stipulates for a proportion of profits as a recompense for his labour or skill becomes a partner in regard to third parties (*Hesketh v. Blanchard*, 4 East, 144); but he is not so when his salary is subject to fluctuation according to the profits of the master's business. *Ex parte* Waters, 19 Ves. 461.

The legal maxim *qui sentit commodum, sentire debet et onus*, has not been without its weight in the discussion of this question; but, as Mr. Ludlow remarks, "this maxim is not without its exceptions in law." Has a tenant for life, or have his creditors, power to come upon the remainderman for the expenses of any permanent improvements? or, as between leaseholder and reversioner in a building lease, is the latter called upon at the end of the term to pay the tenant's building debts? Where there has been no contract, express or implied, there is no liability in law. In the case of a dormant partner there is no express contract, and the question whether one ought to be implied is not necessarily decided by the fact of his having reaped an advantage from any transaction or series of transactions, to which a creditor may have been a party. Moreover, if we were to apply the proposed test literally but universally, it might be found somewhat inconvenient to creditors, especially of joint stock companies: it frequently happens, particularly in abortive schemes, that they alone are the persons who have derived any advantage, and the maxim could hardly be more justly applied than in some such cases, where creditors, well knowing the character of the undertaking, have given credit, not upon the faith of a company, but relying upon the fact that it comprised some sufficient victims for unlimited liability; victims, moreover, who are anything but voluntary parties—using the word in its common, not in its legal acceptance—to the contracts which were afterwards to be the subject of the creditors' claims.

Enough has been said, we think, to prove that the received test of partnership is unscientific and unfair. When we apply it, without the arbitrary distinctions of law, we find that there

may be not only a participation, but even a monopoly, of profits, without partnership, and with the absence of all liability, as in the cases already adverted to, of loans upon exorbitant interest, annuities, and (so-called) salaries to be measured by the amount of profits. It remains to show that it is also *impolitic*.

Any rule of law, which may be defeated by such evasions and contrivances as we have just considered, must be impolitic, however desirable in itself. But this rule appears to be little else than hurtful in its tendency and operation. It has been well described by the late Mr. G. R. Porter, as a rule of "monopolies and restrictions, under the specious guise of protection." So far from its being framed in regard to the natural state of things and based upon reason, it is a palpable interference with the transactions of trade and the liberty of men's actions, having its origin in that system of subtle refinements, which the lawyers of the last century inherited from the schoolmen of the middle ages. It is one of the many monuments that remain of the restrictive and artificial policy of former times, the abolition of which Mr. Stuart Mill considers as "an important element in the freedom of commercial transactions."

Once having got rid, then, of the false notion that abstract justice or legal necessity decides the question, it would not be difficult to find many reasons why men should be allowed to stipulate for a share of the profits of a business, in consideration of their supplying capital to work it, without their being involved in a risk monstrously disproportionate to all their chances of gain.

"Is it expedient,"¹ says Mr. Bramwell, "that such (*commandite*) partnerships should be prohibited? Ought A and B to be prohibited from entering into a partnership on terms limiting the loss of B, or of both? Ought C to be prevented from dealing with them on those terms? The burden of proving this is on those who assert it. This is not a technical view. It is desirable in all cases, and in this I believe most important, to see on whom is the burden of proof. For even if we had none of the valuable evidence which has been given to us as to the mischiefs of the present restriction, to my mind it would have

¹ Mercantile Law Commission Report, App. p. 23.

required an exceedingly strong case to have established the propriety of the prohibition in question. *If ever there was a rule established by reason, authority, and experience, it is that the interest of a community is best consulted by leaving to its members, as far as possible, the unrestrained and unfettered exercise of their own talents and industry.* Our modern legislation has been founded on this principle, with the sanction of the immense majority of those whose opinions are of any value. The restraint on limited liability partnerships offends against this rule; and I frankly own, that, whatever weight is due to the evidence given us, I attach more value to the operation of that general principle, the extent of the effects of which no one can foretell, and which has done so much where permitted to act. If A and B are desirous of entering into such a partnership, and C of dealing with them on its terms, why should either of them be called on to give a reason for leave to do so, beyond this, that they deem it for their interest, and that it is their pleasure to do it, and their will? Who is likely to know better than themselves what will be to their interest? Let the objector make out his objection, and show why they should be prohibited."

It may be objected that, according to our own statement of the law, it contains no such prohibition as Mr. Bramwell here assumes. We admit that in theory, in principle, it does not. What we complain of is, that while in theory the law affects non-interference, practically it is most restrictive and interfering; and it is to deal with this anomaly of the law that we seek the aid of Parliament. What can be more arbitrary than to permit A B to lend X Y 1,000*l.* at 20 per cent. per annum interest, in a business where the profits rarely exceed 15 per cent.; and when X Y, as might be expected, becomes bankrupt, to treat A B as a creditor for principal and interest; while we make C D a partner because he lent X Y 1,000*l.* on the faith of his character as a tradesman, and upon the condition that he was to receive half of the profits, if there should be any? We assume that the creditors of X Y know nothing of A B and C D; and that neither of the latter knows anything of the other. The creditors are not aware of the existence or the conditions of the loan of A B's, or of the advance of C D's

1,000*l.* It is supposed by all the world, except A B as to the loan, and C D as to the advance, that X Y is trading upon his own money, and is neither a borrower from or partner with anybody else; in short, that whatever capital he appears to have is really his own and not another's. Now, when X Y has failed for 10,000*l.*, upon what principle of law, or of economical science, should A B be allowed to prove for his 1,000*l.*, and 15 or 20 per cent. interest, against the estate which he has been principally the means of bringing to ruin; while C D, who did nothing (as we may suppose) but add 1,000*l.* to its value, should be held liable to pay all the debts of X Y, including that which he had so improperly, and—to his creditors—unfairly contracted with A B? Where is now the test of participation in the profits? Where is the good old rule of “in for profit, in for loss?” Is there here no virtual *prohibition* of dormant partnership—no actual encouragement of usurious dealing? And yet such a case as we have supposed is not uncommon!

At present the law is, that every partner—whether he be such on account of his name being published to the world, or, by construction of law, on account of his participation in profits—is liable, to the extent of his whole property, for the debts of the firm. Now, in respect to the first class of persons, no alteration is proposed; for it is plain that they pledge not only the capital of the firm, but themselves personally for the liabilities of the partnership, and credit may be given as much in regard to the latter consideration as to the former. The case of the others, however, is widely different. In nowise can it be said that they pledge themselves personally. Credit is given without any knowledge whatever of their connexion with the firm, and therefore their personal character could never have been the cause of its having been obtained. In ninety-nine cases out of a hundred, that connexion is never discovered until adversity comes, and there is inability on the part of the ostensible partners to meet their engagements. Under such circumstances, equity certainly requires no more than that they should contribute the amount stipulated under the deed of partnership, or lose to that extent if they had already done so.

The present law, moreover, is particularly injurious in its effect upon inventors of useful discoveries, and enterprising men of character, without capital. The effect of a change, such as is now about to be made, has been thus described :—"It would bring the interest of the working man into closer identity with that of the capitalist ; it would bring hope, the value of character, and a chance of advancement earlier in life to the artist, the sailor, the man of talent, and the mechanician ; it would promote schools—in a word, it would develop industry. It is not every Watt that has found a Boulton." Now the skilful mechanic, the experienced clerk, and the ingenious inventor, without means, have no alternative between desperate adventure on their own account, and the ruinous assistance of money-lenders, who charge exorbitant interest, and are the first to pounce upon their unfortunate victims whenever there is a prospect of a reverse. Indeed, it is a common observation, that inventors in England—no matter how valuable and useful their inventions—are generally ruined in their attempts to start their projects, while others make fortunes at their expense. "In the course of my professional life," said Mr. Commissioner Fane, "as a commissioner in the Court of Bankruptcy, I have learned that the most unfortunate man in the world is an inventor. The difficulty which an inventor finds in getting capital involves him in all sorts of embarrassments, and he is ultimately for the most part a ruined man, and somebody else gets possession of his invention." The somebody is frequently a grasping usurer, who has laden the back of the luckless inventor with burdens greater than he could bear. Mr. Babbage, in his admirable treatise on "The Exposition of 1851," regards our present Law of Partnership as one of the most formidable obstacles to the advance of the mechanical arts in this country. "There exists," he says, "in this country a great number of persons of manufacturing and commercial habits, whose knowledge of men is considerable, and whose judgment of the capabilities of a proposed scheme or invention is cautious and judicious. Persons of this description often possess capital, or such credit as easily to command its use. If partnerships could be entered into in which the liability was limited, many persons so circumstanced would naturally use

their skill and knowledge in selecting a certain number of schemes, in each of which they would embark a small sum. By thus spreading the risks over an extensive field, the profits to the capitalist would be much more certain; whilst many an excellent invention, now lost for want of capital to carry it out, would thus enrich its inventor and benefit the country."—P. 128.

There have been great efforts of late years, in the United Kingdom, towards founding Schools of Design in our principal towns. But, under the present Law of Partnership, these most laudable attempts must be attended with but comparatively limited success. Give a rational ground of hope to the industrial artist, that at some future time he may make use of his designs and his fabrics to his own profit, and you supply the strongest incentive to the ingenuity—to say nothing of any higher attributes—of the working classes. "At St. Etienne, where they manufacture ribbons, infinitely superior to those which we manufacture at Coventry, the system [of limited partnerships] prevails to a great extent; and a great many clever workmen, artisans, draughtsmen, and managers of the loom, have accumulated property, and are actually now conductors of business, who have risen from their talent, and the advantage that talent has had in forming connexions with men of property; and in St. Etienne it prevails to a great extent, and is doing a great deal of good."¹ Many similar illustrations might be found in other parts of the Continent, but especially in the United States, where discovery and invention have moved forward recently with strides unparalleled in the history of the world.

But it is needless to go through all the various instances that might be produced in favour of a change in the law.² It is

¹ J. Howell, Esq., before Select Committee on the Law of Partnership, 1851.

² A number of gentlemen in the city, forming the city committee for the amendment of the bankruptcy laws, some time ago, circulated a paper of queries, partly relating to the subject in hand, amongst the leading mercantile communities of the Continent and America. The paper contained the following queries:—Are partnerships *en commandite*, speaking generally, considered more or less successful than other partnerships? Do such partnerships command the same amount of credit and general confidence as ordinary partnerships? Replies were received, generally of a

obvious, that whatever makes capital more accessible to skill and industry, must be advantageous, not only to the persons who would be immediately served, but to the country generally. That certainly would be a much more natural and wholesome state of things, which would enable the mechanic, the clerk, and shopman to approach a capitalist, who—upon the faith of their skill and character—might be satisfied to adventure a certain sum of money with them in business, if by doing so he did not render himself liable to the loss of his last shilling and his last acre, than the present system, which excludes them from all hope of pecuniary aid, but from charity or usury. They would still require all their reputation for ability and probity to induce men of wealth to join them; but once having succeeded, they would trade upon a certain capital, and not upon wasting loans, which any day might be withdrawn to their ruin; while their creditors would have a substantial and not a supposititious capital to meet their demands.

Nor should it be forgotten that the creditor frequently has now no means of knowledge whether, even in the most reputable firms, the capital on which they are trading is not wholly derived from extraneous sources. The periodic *panics* with which the mercantile world is visited make strange revelations to this effect. They show that our boasted theory of unlimited liability is more specious in appearance than serviceable in fact. The veritable capitalists put on the screw when they deem that their safety requires it, and they generally manage to save themselves at the expense of creditors, who were deceived by appearances which could have never been maintained but for them. How much fairer would it have been if they had been known to the world as having embarked a certain amount of money, for which they were to remain liable for a stipulated period? But whether

very favourable character, from Paris, Rouen, Lyons, Marseilles, Grenoble, Bordeaux, Besançon, Cambrai, Antwerp, Brussels, Aix-la-Chapelle, Basle, Berlin, Leipsic, Amsterdam, Rotterdam, Hamburg, Bremen, Trieste, Cadiz, Madrid, Oporto, Milan, Venice, Turin, Naples, Stockholm, Gottenberg, Russian Finland, New York, Boston, Baltimore, and Philadelphia. The answers from the United States were strongly in favour of the principle of limited liability, and the general result has been to increase the desire amongst mercantile men for a modification of our laws of unlimited liability.

it would have been fairer or not, no one will deny that it would be far more safe and satisfactory for the creditor, which goes a good way to answer one of the main objections against limited liability.

The last consideration is an answer to those who maintain that limited liability would affect *commercial credit* injuriously. Lord Curriehill thus states another objection: "In particular, the introduction of this privileged class of partnership into the commercial community might seriously affect the credit of other partnerships, whose partners might have no wish to avail themselves of such an immunity. For example, under our existing law, if a house in Glasgow or Belfast, known to have partners of substance, send an order to a London merchant, he executes that order at once on the credit of the wealthy partners, although their names be not set forth in the firm. But he would hesitate to do so, if partners of companies had the power of freeing themselves from liability for the debts of their partnerships, without the consent or knowledge of their creditors, on the conditions required by the law of *commandite*; because it might be that the partners on whose credit he could rely, might, unknown to him, have procured such an immunity for themselves." The advocates of unlimited liability must be driven rather hard for arguments when they resort to such as this. We are not in the habit of acquiring our knowledge so much in the abstract form, as to be likely to "know" that a man was "a partner" in a firm, without knowing at the same time what kind of partner he was—whether general or *commandite*. Doubtless, we might hear, or have some vague notion, that A B was a partner in J. S. and Co.'s firm; but, even in the mercantile millennium of unlimited liability, that is not the kind of knowledge that would induce us to credit the order of J. S. and Co. We would like to inquire a little further; and it would be just as easy to ask, "Is A B a partner only liable for 5,000*l*." as to ask, "Is A B one of your general partners?" And as to "partners freeing themselves from liability for the debts of their partnerships," Lord Curriehill surely does not suppose that the retrospective principle of the Irish Tenants Compensation Bill was ever meant to be extended to the Partnership

Amendment Bill. We know of no way in which a partner, or any one else, according to the law of England, can free himself from liability by an act of his volition, designed to have a retrospective effect. If these wealthy persons were general partners, they would be liable for all the debts of the firm contracted while they were so, and we are not aware of any mysterious juggle of the *commandite* system that could free them from that liability. If they were not general partners, and the London merchant, supposing they were, entrusted the firm with goods, he must only submit to the penalty generally attached to negligence: if they had been, and stealthily retired, without notice to the creditors of the firm, we strongly suspect the proposed act would not have been so utterly subversive of all our principles of law and equity as to enable them to escape from risk.

The truth is, that commercial credit has been made a very bugbear in this question of limited liability. How far has unlimited liability helped our commercial credit? If one may slay its thousands, has not the other slain its tens of thousands? If one may enable men of money to make considerable profits without the risk of ruin, has not the other enabled men of no money to effect considerable ruin without the risk of loss? Is it not as well to have the guarantee of a certain, though possibly an inadequate fund, as to have the possibility of no fund, though there be in addition the figment of unlimited liability, by way of solace for those that love to contemplate abstractions? We are told, forsooth, "that the commercial world would become exposed to a class of *frauds* from which in this country they have hitherto been exempted." Many of our readers will, no doubt, like ourselves, be somewhat sceptical, whether indeed we *can be* exposed to any species of commercial frauds from which we have been hitherto exempt. We fear the ingenuity of our *chevaliers d'industrie* has left little room for novelty in commercial frauds. Their industry has not much relaxed of late; but, like our modern poets, they mainly rely upon the wit of their ancestors. For our own parts, if by exposing ourselves to new frauds, we could get rid of the old ones, we should not hesitate to accept the change. But let that pass. Upon carefully reading the opinion of Lord Curriehill, from which we quote the objection,

we find little semblance of reasoning to support it. These frauds, it is said, will arise from two sources:—1st. Creditors may not be aware who are *commandite* partners, and who are not. Our answer is, that this will depend partly upon the system adopted by the Legislature to afford them proper information, and partly upon their own care in instituting proper inquiry. There is no necessity—no reason “in the nature of things”—why Parliament should adopt a system that will afford faulty information, and there ought to be no legislation on the hypothesis of negligence on the part of those whose duty it is to be diligent. 2ndly. We are told that, although in theory, the law of *commandite* holds out that the partnership has a certain amount of put-in stock, yet there is no security that such stock is in existence at the time when the debts are contracted. In reply to this objection, we may say that the *commanditaire* ought always to be liable to make good the amount for which he has declared himself a partner. Such is generally the law of *commandite* partnership in all countries where it is adopted. But if the meaning of the objection is, “Yes, no doubt that is the law, but the creditor has no *certainly* that the *commanditaire* at all times will be able to pay that amount,” then we say such an objection must always lie against every transaction upon credit; for credit implies confidence, and confidence implies risk; and to meet such risk, there should be, indeed there is, always superadded a margin for insurance beyond the cash price of commodities. If the potent wizards of the Statistical Society, who ransack all creation for facts and figures, should some day discover that out of every 100 *commandite* firms, only 99 pay their debts, while out of every 100 ordinary partnerships $99\frac{3}{8}$ pay theirs, then no doubt, “in the natural course of things,” the *commanditaires* must be satisfied to pay an increased rate of premium as the price of their credit. We shall only add upon this head, that the *commandite* system will present an opportunity for the criminal prosecution of fraudulent partners, such as is badly wanted in the present state of our law. If a *commanditaire* “holds out” that he put into the capital stock of the partnership a certain sum of money, which he did not actually and *bond fide* put in, and thereby on false

pretences obtains credit for the firm, he is guilty of a fraud, which ought, indeed we think even now might be, treated criminally: while a general partner may "hold out" any number of false pretences—frequently far more efficacious for his purpose—in his West-end mansion and country villa, stately equipages and retinue of servants, with all the pomp and circumstance of wealth, without the gloomy courts of Newgate ever flinging a shadow across his cheerful career. The *commanditaires* cannot draw an income where there are no profits without a false balance-sheet, which it would generally be the interest of the *gérant*, or manager, not to make out; so that if he holds his position in the firm, tempted by the hope of redeeming what he has lost, he must do so without emolument, though he continue his risk: while a false balance-sheet would bring the Old Bailey before his eyes, and this must be some consolation for all those poor people who are waiting to be plucked as soon as possible after the passing of the Partnership Amendment Bill—if we are to place any faith in our dyspeptic seers. Our "general" partner, on the other hand, years after the capital stock of the concern has sunk below zero, may still sip the champagne of his creditors, and never exhibit a blush, except in the unmentionables of his lacqueys. Such cases are not of very unfrequent occurrence in England; and yet we are told the introduction of a measure which will diminish their frequency will affect the commercial credit of the country injuriously. We hope, on the contrary, it will do something to restore it; and certainly it is not premature to devise some measure likely to have so desirable an effect. It has been objected, that the reason why *commandite* partnerships work well in France and America, is because of the stringent laws of bankruptcy which those countries possess. We trust that one good result of the introduction of limited liability into England will be an assimilation of our bankruptcy law in all cases of fraud. It will be difficult to make the public understand why a fraudulent *commanditaire* should be punished, while an "unlimited" partner should escape scot-free for an offence of the same character.

It has been said that removal of loss from those who voluntarily engage, have the means of watching and controlling, and

would have solely participated in success, to throw it upon those who have no insight into the business, no power of management, and no share in advantages, is unjust : to which objection Mr. Ludlow well replies, that it "applies almost exactly to the relations of director and shareholder in a registered company, and goes almost the full length of a claim for *commandite*. The directors engage involuntarily, the shareholders often involuntarily, as in the case of the husbands of female shareholders, executors, administrators, &c. The directors have the absolute means of watching and controlling, and the shareholders are excluded by law from the management. The directors have moreover at least the first profit, since their emoluments are a prior charge to dividends, not to speak of patronage. Even as between the company and strangers, the engagement with the creditor is quite voluntary on his part, generally involuntary as respects each particular contract on the part of the shareholders as entered into behind their backs by the directors. Again : the creditor dealing with the actual commercial body has often far greater means of watching the management than a mere shareholder. And, lastly, it is contrary to political economy to suppose that he will have entered into any engagement without expecting some share of advantage from it."

In answer to the objection that the proposed change would be likely to lead to excessive and rash speculation, it might be sufficient to say that it has not had that effect in France, in Holland, in Germany, or in the Northern States of America, where it has been found to work beneficially ; but let us ask, what has been the effect of the Joint Stock Companies' Act in this respect ? Has it been successful, as was anticipated, in repressing fraudulent and delusive undertakings ? The original draft report of Mr. Slaney's committee, alluding to that act, proceeds to say that "it has had little effect in sufficiently checking the commencement of rash speculations, as may be seen in the last annual return of the joint stock companies,—that the number provisionally registered in 1850 were 159, and of these only 59 were completely registered, whilst many of those only provisionally registered were of a highly speculative character. Your committee think it probable, *if limited liability had been*

permitted, that many cautious persons, deterred by the unlimited risk of shares in joint stock companies, would have formed and carried out useful enterprises of a better-considered and of safer character than those thus put before the public." It is idle to expect that speculation can ever be repressed, or even restrained, effectually by legislative interference; and it is impossible to conceive a system more ingeniously devised than the present one for the interests of fraudulent promoters. For a few shillings, any bubble may be set afloat under the high-sounding auspices of provisional registration; and it needs only a flashy name or two—frequently obtained under the notion of the absence of all risk—to give it credit, if not *éclat*, with the public. Vast numbers of schemes are thus organised by men of straw; and it would be difficult to imagine a state of things more calculated to mislead the unwary.

It was supposed that registration in an office accessible to the public would secure extensive publicity, and thereby enable all persons desirous of dealing with promoters to ascertain with ease their names, and the precise nature of their projects. But however satisfactory this may be in theory, practically it is a mere delusion. Few people know anything about the Registration-office, and fewer still are acquainted with their privilege of inspecting the records. Even were it otherwise, there is nothing to prevent equal, if not greater, notoriety in the case of *commandite* partnerships.

At present, the promotion of public companies is, on account of the law, almost wholly in the hands of adventurers. Men of substance and character are generally very chary of undertaking such a risk, because they know not to what extent the fraud or folly of their partners may involve them. The public are thus deprived of the protection which such men would be likely to afford them, and are left to the mercy of a class of persons much less to be relied on. This would be so no longer, if there were a law of limited liability.

Let us suppose that a company has been well started, and having lived a few years, it ultimately proves a failure. Then comes the application of the Winding-up Acts—which have been described by a learned judge from the bench as little less

than a public nuisance,—a process equally unsatisfactory to the creditor, and ruinous to the shareholder. It commonly happens that its promoters and original shareholders, who have been in the secret of its decline, but who managed to bolster it up while it suited their purpose, have taken care to relinquish their places, in due time, to unsuspecting victims, upon whom are visited the accumulated sins of their predecessors at its winding-up.

With such facilities for entrapping the public into futile speculations, without any risk to those who are likely to be the real gainers, it is no wonder that frauds and victims have been multiplied to an unprecedented degree of late years. The only remedy appears to be an extensive modification of the present law of partnership.

Mr. Ludlow, a gentleman who has devoted much consideration to the present question, in his reply to the queries circulated by the Mercantile Law Commission, observes: "Of course, nothing is more startling at first than the proposition that unlimited liability is in this country the great incentive to speculation, and source of insecurity in joint stock company enterprise; and yet all experience and reflection has confirmed me more strongly in this view." He states his reasons at length with great ability and force. Our want of space, however, prevents us from doing more than giving a very condensed view of them. In a joint stock company under the Registration Act, the proprietary body is wholly destitute of a control over the business of the company commensurate with their responsibilities; and, secondly, it is impossible for the shareholders to maintain a due proportion between individual capital and collective engagements. "The Registration Act," says Mr. Ludlow, "requires the deed of settlement to set forth the amount of the proposed capital, and of any proposed additional capital . . . the amount of money (if any) to be raised, or authorised to be raised, by loan . . . the total amount of the capital subscribed, or proposed to be subscribed, at the date of such deed. What are these but devices, more or less wise, for proportioning engagements and capital? What are they but notices to the world at large to limit the extent of its dealings with the company by the knowledge thus afforded of the capital upon which it works? But

the rule of unlimited liability here steps in, and renders these endeavours at most only half fruitful. The 1,000,000*l.* of capital upon which the company is constituted is but its nominal capital; its real capital as towards the world at large is that of the collective fortunes of all the shareholders. The credit which it enjoys is in great measure proportioned to the public knowledge or notion of the resources of this or that individual shareholder. Long after all the registered capital is exhausted, it would yet enjoy almost boundless credit, if it numbered a Baring, a Rothschild, a Drummond, amongst its members; and what the public are willing to give, the directors are willing to take. They are easily tempted, to say the least, to deal not on the footing of the actual assets in hand, but upon that of the presumed or real wealth of Sir Septuagesimus Baring or X. Y. Drummond, Esq., their co-directors or co-shareholders. In other words, the unlimited liability company has the dangerous privilege of retaining the individual credit of the private partnership system, whilst deprived of its checks upon the abuse of that credit."

Mr. Ludlow is one of those, however, who, as between the conflicting claims of *commandite* partnerships and chartered companies, is decidedly in favour of the latter; but we cannot refrain from adding the following extract from his paper, inasmuch as it is equally pertinent to the former: "I am therefore," says Mr. Ludlow, "strongly of opinion that in large undertakings carried on by partnerships of many members, limited liability for all is the true condition of commercial safety,—the only one which tends to secure the management of affairs to the most able, the most prudent, or the most wealthy amongst the members. Let us open our eyes, and look around us. Does not common sense tell us that under no system of unlimited liability for all, or for a few, would the chairmanship of the North-Western Railway have been held by Mr. G. C. Glyn, and transferred from him to Lord Chandos? Or where, in fact, is the railway company which could have been constituted on any other principle? But I believe, also, that in such undertakings, the one point to be kept constantly in view is the securing a due proportion between capital and engagements;

and for this purpose no means too stringent can hardly be devised."

Mr. Commissioner Fane—who has bestowed considerable attention upon the whole question of limited liability in all its bearings, and whose evidence before the committee of 1851 contains a mass of valuable information upon it to be found perhaps nowhere else in the same compass—suggests a scheme which would satisfactorily meet all the difficulties of the subject, and would certainly obviate many of the objections properly urged against the operation of the Joint Stock Act.

We make no apology for presenting it to the reader, as we conceive it to be the best which has yet been offered to the attention of the Legislature.

"1st. That no member of a company should be liable to a creditor, but that the creditor's rights should be against the company only.

"2nd. That if a company did not admit a demand, the demandant should not be called upon to sue the secretary or any individual, but the company only, by the name that it hath chosen to assume: and that all processes and notices should be left at the office, or sent by post to the office, and not served on any individual.

"3rd. That if judgment was obtained against the company, and the company did not satisfy the judgment, the company should be declared bankrupt, and its affairs wound up. The practical effect of this would be that all the difficulties to which Lord Eldon refers would vanish. . . . The creditor would not have to look for directors, or secretary, or contributors (when he got judgment), for payment. They would look for him, and pay him, for if they did not he would make the company bankrupt.

"On the bankruptcy, the creditors would assemble, assignees would be chosen; the property of the company would pass to them, and they would receive and distribute it. Their means of ascertaining what the property consisted of would be ample. The books and papers would be seized, and the directors and officers might be examined, according to the practice in bank-

ruptcy. All who had agreed to contribute would be compelled to do so, and if there was enough to pay all claimants, they would be paid: if not, each claimant would bear his proportion of the loss. Innocent creditors and innocent shareholders would each have learned a lesson, which would teach them to be more prudent in future transactions. Each would lose something, and no individual would be ruined by gigantic liabilities utterly disproportioned to his share of possible profits."

Many have been found to admit all the great and numerous advantages of a law of limited liability; but so strong is their aversion to organic changes, that they have preferred to advocate the improvement of the cumbrous machinery which we possess, to compass an end that might more satisfactorily be gained by an act of the Legislature. To diminish the expense, and facilitate the obtainment of charters of incorporation, they contend would be practically the same thing as introducing the law of *commandite* partnerships. Among these, as we have seen, is Mr. Bellenden Ker. Such a course has also been recommended by several of the committees of the House of Commons.

On the other hand, it has been questioned whether Government should undertake the office of attempting to impose any check on speculation, it being contended that the wisdom of private undertakings properly rests with individuals, and not with a public board. This argument has greater force when it is proposed to make charters common, and easy of acquisition, for the purpose of conferring the attribute of limited liability upon joint stock companies generally. It has also been urged that the expense of charters must always be burdensome, and their operation unnecessarily troublesome, without any corresponding advantages.

It is not impossible even now that such a plan may be adopted to some extent for the settlement of this long-agitated question. The Partnership Amendment Bill met with so much noisy opposition in the House of Commons, that it is by no means improbable that there may be some hesitation on the part of the Government to bring it forward again in its present shape; and that if a strong effort shall be made next session to

substitute the system of limiting the liability of trading partnerships, by conferring charters at a cheaper rate and with greater facility than hitherto, such a proposition, it is to be feared, may not be rejected. It will not, however, be denied, by any one conversant with the present mode of conducting that department of the business of the Board of Trade, that a very great alteration is required in the system now in force for granting charters of incorporation. The objections to the present system are numerous; and so long as they remain, it is useless to expect a satisfactory solution of the difficulty in that direction.

The President of the Board of Trade discharges not merely ministerial but also judicial functions, in relation to the conferring of charters and letters-patent under the statute (1 Vict. c. 73). He is, to all intents and purposes, a judge, and his office as such is open to the very grave objection that its proceedings are *secret*, and therefore unattended with responsibility. He is a judge, inasmuch as he undertakes to decide upon the merits and demerits of all such projects as seek incorporation from the Crown, upon which his single dictum is arbitrary, and yet final. The theory is, that he merely advises the Crown in his capacity of minister; but the truth is, that he presides over a secret and irresponsible tribunal with a summary jurisdiction, from which there is no appeal; and the practice, in all probability, is, that generally he delegates this important function to a subordinate, who thus wields power of a nature unknown to the superior courts of the realm, without any of the guarantees for its faithful and judicious use, such as they give by the publicity of their proceedings.

There is the still further objection that this tribunal, as now constituted, must always be justly exposed to the suspicion of being influenced by considerations of party policy. It is too much to expect that political considerations are always excluded, where a substantial favour is in the power of a minister. At all events, it is no wonder that the notion is common, that a little parliamentary influence judiciously administered is likely to be of quite as much benefit in seeking a charter, as the more legitimate support of men of mercantile reputation and ample fortune. This ground of suspicion will remain, so long as the

judicial proceedings of the Board of Trade are conducted with closed doors.

Another common and well-founded objection is, that at present there are really no acknowledged principles or rules to guide the Board of Trade in its decisions. Hence there is the utmost uncertainty beforehand as to whether any project is such as, in itself—whatever may be its extrinsic recommendations—will meet acceptance or rejection. Sometimes there is a leaning towards conferring charters on Irish undertakings, for whatever purpose. Sometimes the colonies are in the ascendant. One president is favourable to the principle of limited liability, and therefore is disposed to grant charters very much as a matter of right. Another has a crotchet of a particular school of economists, and considers them always exceptional, and only to be justified in very special cases. One is a disciple, another an opponent, of *Laisser faire*. Not unfrequently the same functionary grants and refuses, without any apparent principle whatever. It is impossible to discover any fixed principle in the decisions of the Board of Trade, because there really is none; and even if it were otherwise, it is a very questionable policy to relegate all power in such important matters to any irresponsible individual, however wise or exalted. Principles should be laid down for his guidance, instead of their being wholly the result of his own personal convictions or partialities. If Parliament will not enact a law of limited liability for trading partnerships, but will choose rather to aim at the same result through the machinery of the Board of Trade, it would do well to re-organise that tribunal, and to constitute it openly what in reality it would be, a court with judicial power, having cognizance of all matters connected with the incorporation of trading companies. Such a course would hardly be necessary if it were determined to divest the Board of Trade of all discretion in such matters, and to grant charters as a matter of course, just as companies now obtain complete registration, upon compliance with the provisions of the Joint Stock Act. The duties of the president would then be almost purely ministerial, and there would be no room for the foregoing objections.

There is another objectionable feature in the administration of

this department of the business of the Board of Trade, which deserves to be noticed here. The president has been accustomed to act, in the granting of charters, under the advice of counsel ; and it has been the practice frequently for the same counsel to draw charters for those who make application for them, and afterwards to settle them on behalf of the Crown. This practice is certainly objectionable in principle, and cannot be continued if charters become more common. It is liable to give rise to the notion that secret influences may be brought to bear for the attainment of what should only be granted on public grounds ; and unquestionably a law officer, acting on behalf of the Crown, should not be placed in a position where his duty seems to be divided between the Crown, and those who seek a favour or a right from the Crown.

In the New England States of America, charters are conferred, almost as a matter of course, at the expense of 8s. or 10s. each, not only upon banking, insurance, railway, and other companies, for such extensive schemes, but upon manufacturing and trading partnerships, involving the employment of unusually large capital. Each kind of company, so incorporated, is governed by a statute applicable to itself. But such an arrangement is not very likely to be adopted here. It is more likely that the suggestion which has been thrown out by commissioners, and committees of the House of Commons, of increasing the facility of obtaining charters through the Board of Trade, will be acted upon by Parliament ; and, in that event, it is very much to be desired that suitable steps be taken at the same time for placing that department upon a satisfactory basis.

We trust, however, that such a method will not be adopted for settling the question of unlimited liability ; and that if it should be proposed in the next session, it will be defeated. No useful end can be answered by maintaining a cumbrous and expensive formula for what may be accomplished in a cheaper and more convenient manner. It can answer no purpose of good to continue and increase exceptional bodies in the world of commerce, when all trading partnerships might be classed under two or three general heads, divided upon some intelligible principles. We have already the old corporations constituted by royal

charter and by Parliament, with complete limited liability ; we have also a number of companies incorporated by letters-patent, under the 1 Vict. c. 73, whose liability is marked out by the tenor of their respective patents—generally twice or three times the amount of their nominal capital ; and other companies, constituted under the same act, also by letters-patent, whose liability is expressly declared to be unlimited ; we have joint stock companies formed under the 7 & 8 Vict. c. 110, possessing no immunity as to the limitation of the liability of their shareholders ; we have the numerous class of cost-book companies, which, often as they have come of late under the cognizance of our courts of law and of equity, the judges declare themselves incompetent to define ; we have banking companies, constituted under the special acts made for such undertakings ; we have industrial partnerships, under the 15 & 16 Vict. c. 31 ; to say nothing of land and building societies, loan and friendly societies, *et hoc genus omne*. In place of unnecessarily adding to the number of these exceptions to our Law of Partnership, it would be far better to reduce their number by a more scientific and intelligible division. At all events, where unlimited liability is to be conferred, it ought to be conferred upon some appreciable principle, and not merely upon the *dictum* of a public board, and still less upon the caprice of a single official.

Since the foregoing remarks were written, the Limited Liability Bill has received the sanction of the Legislature, and is now part of the law of the land. The Partnership Amendment Bill, which involved the same principle, has been rejected by Parliament, or rather has been allowed to drop through by the Government, in the hurry and pressure of business which always attend the close of a Parliamentary session. To our thinking, the less important measure has been successful ; and we suspect that the advocates of limited liability will be disposed to receive the recent act only as a small instalment of justice to a sound principle. Most of the arguments which are to be found in the foregoing pages tell as much against the unlimited liability of dormant partners in ordinary trading partnerships,

as of shareholders in joint stock companies; indeed, those of them that are derived from considerations of political economy are more forcible, when regarded with reference to the former class. The industrious shopman, the faithful clerk, the skilful artisan, and the ingenious inventor, are as much as ever removed from the hope of receiving pecuniary co-operation from wealthy persons who might be disposed to advance them capital, where there was a hope of profit, without the possibility of ruin; unless, indeed, the clerk, the mechanic, or the inventor, has the good fortune to be acquainted with a number of other persons equally well disposed, sufficient to satisfy the requirements of the Joint Stock Companies' Registration Act (7 & 8 Vic. c. 110), of which the recent act is to be taken as a part (18 & 19 Vic. c. 133, s. 16); and they will remain so, until some such measure as that proposed in the Partnership Bill passes into a law.

By the Partnership Amendment Bill, as finally amended in committee, it was proposed to enact, "that no person who may hereafter lend any money to any other person not being a banker, or to any partnership or company, not being a banking partnership or company, shall be deemed a partner with the person, or a member of the partnership or company, borrowing such money, by reason of his receiving, or being entitled to receive, a portion of the profits, made by such person, partnership, or company, so borrowing, or a sum varying according to the amount of such profits, either in lieu of or in addition to any interest for or on account of such loan, or by reason of any agreement to bear any portion of the loss which may be sustained by such person, partnership, or company, in any trade or business carried on by him or them."

The bill contained, *inter alia*, a provision for the registration of the name, place of business, and description of the lender; the name, place of business, and description of the borrower; the amount of the loan; the proportion of profits, interest, or sum, varying according to the amount of profits, payable in respect of such loan. And if such was not registered within ten days from the making thereof, it should not be recoverable; and if any material omission or misstatement was made in any

of the above particulars, no interest or profits in respect of such loan should be recoverable by the lender.

The following rules were proposed with respect to the registration of loans:—

1. This rule referred to the registrar's duty in providing proper books.

2. Before registering any loan, the registrar was to require the production of the instrument for securing or manifesting the same, and the profits, interest, or sum payable in respect thereof, or such other evidence of such loan as he should deem sufficient, and should stamp the instruments so produced with the seal of his office.

3. Provided for the registration of the payment of a loan or part of a loan.

4. Related to the advertising of such repaid loans.

5 and 6. Stated the fees to be paid to the registrar.

The most important clause in the bill (sec. 6) was as follows: "In the event of a borrower being adjudged a bankrupt, taking the benefit of the Insolvent Debtors' Act, or dying in insolvent circumstances, or if such borrower is a company, in the event of its being declared bankrupt, or of an order being made for winding it up, a lender of a registered loan shall not be entitled to receive any portion of his principal, or of the profits, interest, or sum payable in respect of such loan, until the claims of the other creditors of the borrower shall have been satisfied; and in addition thereto, he shall be liable to make good to the other creditors of the borrower any deficiency of assets to the extent of all sums of money or other benefit received by him during the three months immediately preceding any such event as aforesaid, on account of the principal of such loan, or on account of the profits, interest, or sum payable in respect of the same; but the principal of such sum which shall have been repaid shall be deemed to have been repaid within such three months, unless the date of repayment shall appear by the registrar to have been prior to the period of such three months."

The bill contained only one other clause, to the effect that agents, &c., were not to be deemed partners.

Had this measure—which we have referred to at some length,

because of its great value—passed into a law, little would have been left for the advocates of limited liability to desire ; and little just ground of complaint would have remained to the public—including the opponents of the principle. It would have put an end to the anomalies which we have pointed out in the foregoing pages as now existing in our law, and it would have been a real boon to that most deserving and useful class of the community to whom the Limited Liability Act will afford very inadequate relief. The machinery of the Joint Stock Acts is too cumbrous to be put into motion by the class of persons to whom we refer, and their only hope of benefitting by the Limited Liability Act will be through the intervention of company-makers, who will be sure to monopolise for themselves whatever profit may be made out of any undertaking which gets into their hands.

There is, moreover, a practical absurdity in passing one bill and rejecting the other ; for though the intention of the Legislature evidently was to refuse the benefit of limited liability to private individuals, and to extend it to joint stock companies, there appears to be nothing either in the Joint Stock Companies' Act, or in the recent act, which can prevent a number of persons, sufficient to form a company, holding together until it obtains registration, and then all of them relinquishing their shares to three persons, that being the number required to constitute a company with limited liability after it has been once registered. Not that we regard this as any real defect in the act itself, for we only wish that the principle of limited liability, having been conceded by Parliament, had been completely carried out, without any attempt at preventing its application by encircling it with barriers strong enough only to embarrass the weak and friendless, but too weak to accomplish the particular design for which these barriers were intended.

We are not without hope, however, that the act, such as it is, will be productive of good ; and we have already had opportunity enough to witness the falsification of all those predictions of disasters which were to befall us whenever the law of limited liability was passed. More than two months have now elapsed since the bill received the royal sanction, and we appear to be no nearer national bankruptcy than we then were. Scarcely

more than the average crop of new schemes have appeared in the advertising columns of our newspapers ; nor do those that have appeared seem to be of a less *bond fide* character than the projects which were so plentifully raised under the Joint Stock Companies' Registration Act. People who have money appear as little as ever disposed to throw it away, even though they need be no longer deterred by the fiction of losing more than they have. In short, English commercial credit rests pretty much upon the same basis that it had in August last, and there has been as little sign of a deluge in the mercantile world, after the passing of the Limited Liability Bill, as there was in the political world after the resignation of Lord Derby, notwithstanding the solemn warnings of our legal Lord Maidstones.

We now proceed shortly to point out the provisions of the Limited Liability Act.

The 1st section provides for the mode of obtaining limited liability by future companies (other than an assurance company), to be formed under the 7 & 8 Vict. c. 110, and it enacts, that the deed of settlement of the company shall be executed by shareholders, not less than twenty-five in number, holding shares to the amount in the aggregate of at least three-fourths of the nominal capital of the company, and that there shall have been paid up by each of such shareholders, on account of his shares, not less than 20*l.* per centum.

Section 2 prescribes the mode of obtaining limited liability by companies now or hereafter completely registered under the 7 & 8 Vict. c. 110 ; and section 3, by companies constituted under Acts of Parliament. Sections 4 and 5 relate to the regulations to be observed on complete registration with limited liability, and to the penalties to be inflicted for non-observance of such regulations.

The 6th section, which has been subjected to what was intended to be very severe, but, to our minds, wholly uncalled for, criticism, by a learned writer who has edited the act, enacts as follows :—"No increase to be made in the nominal capital of any company that has obtained a certificate of complete registration, with limited liability, shall be advertised, or otherwise treated as part of the capital of such company, until it has been

registered with the registrar of joint stock companies; and no such registration shall be made unless a deed is produced to the registrar, executed by shareholders holding shares of the nominal value of not less than 10*l.* to the amount in the aggregate of at least three-fourths of the proposed increased capital of the company, nor unless it is proved to the registrar, by such acknowledgment and declaration as hereinafter mentioned, that upon each of such shares there has been paid up by the holder thereof an amount of not less than 20*l.* per centum;" and then comes a penalty for the violation of this rule.

Under the 7th section members of certificated companies are freed from personal liability; and by the 8th section, individual shareholders are to be liable only "to the extent of the portion of their shares respectively in the capital of the company not then paid up."

The 9th section contains a very important enactment. It enacts, "that if the directors of any such company shall declare and pay any dividend when the company is known by them to be insolvent, or any dividend, the payment of which would to their knowledge render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted, so long as they shall respectively continue in office: provided that the amount for which they shall all be so liable shall not exceed the amount of such dividend; and that if any of the directors shall be absent at the time of making the dividend, or shall object thereto, and shall file their objection (*g*) in writing with the clerk of the company, they shall be exempted from the said liability." As a specimen of the criticism with which the act has been treated by some of its learned editors, we may be permitted to give a note by Mr. Sweet on this section:—

"(*g*) This does not refer to absent directors; it is their absence, not their objecting, that exempts them."

If a note upon a note were not somewhat objectionable, we might be allowed, in the same spirit of criticism, to ask, *What* does not *refer* to absent directors? If the learned editor means that sentence in the section where he has placed the reference to his note, we agree with him; but, in that case, we are obliged

to draw a conclusion contradictory to his, viz., that it is their (the directors') objecting, and not their absence, exempts them. We might go on to put the case in the alternative, and we have no doubt we might in the end succeed in making still more confused what is stated in the act itself in very plain and intelligible terms.

By the 13th section, certificated companies are to be wound up, whenever, on taking the yearly accounts of such, or by any report of the auditors thereof, it appears that three-fourths of the subscribed capital stock has been lost or become unavailable in the course of trade, from the insolvency of shareholders, or from any other cause, the trading and business of such company shall forthwith cease, or shall be carried on for the sole purpose of winding up its affairs; and the directors of such company shall forthwith take proper steps for the dissolution of such company, and for the winding up of its affairs, either by petition to the Court of Chancery, or by exercise of the powers of the deed of settlement, or by such other lawful course as they may think most fit.

The only remaining section worthy of particular remark is the 16th, which extends the provisions of the 7 & 8 Vict. c. 110, and the 10 & 11 Vict. c. 78, save in so far as they are varied by this act, to persons and companies applying for or obtaining a certificate of complete registration, with limited liability; and the 17th, which enacts that the Winding-up Acts shall apply to companies under this act. It may also be noticed that the appointment of an auditor in companies formed under the 7 & 8 Vict. c. 110, is subject to the approval of the Board of Trade.

ART. II.—ON THE COMPETENCY OF LOAN-CONTRACTORS TO SIT IN PARLIAMENT.

WE believe that we shall perform an useful service in calling attention to the recent decision of the Select Committee of the House of Commons on Baron Rothschild's case. In a constitutional point of view the question is of importance, and the discussion that it has now undergone may probably afford occasion for some legislative enactment. A member of the House of Commons has already given notice of a motion on the subject for the next session. But to such of our readers as delight in the discussion of nice points of law, and in the precise and critical construction of Acts of Parliament, the argument upon the honourable baron's competency—we cannot say to *retain his seat*, for he has never taken it, but—to retain the right to take it, whenever the religious test which now keeps him below the bar shall have been removed—will afford, if we are not mistaken, considerable gratification. The legal question involved is a somewhat difficult one; the facts peculiar and anomalous in their character; and the highest authorities of the law are rather singularly at variance on the merits of the controversy.

The question as to the vacating of Baron Rothschild's seat was mooted in the House of Commons by Mr. T. Duncombe, the member for Finsbury, who, in the month of June last, moved, pursuant to notice, that a new writ be issued for the city of London in the room of the baron. Upon this motion the Attorney-General proposed as an amendment, that the question should be referred to the consideration of a select committee; at the same time intimating not obscurely his own impression that the paper which had been already laid before the House, and was described therein as "the *Contract* entered into by Messrs. Rothschild & Co. with her Majesty's Government," fell within the provisions of the Contractors' Act, 22 Geo. 3, cap. 45. In the debate which ensued, Sir F. Thesiger went still further than

Sir A. Cockburn. He considered the case against the baron so clear, that the proper course was for the House at once to issue the writ. Mr. Walpole spoke less positively, but was inclined to the opinion that the seat was vacant. The Solicitor-General, on the other hand, urged that loan contracts had hitherto not been considered to fall within the disqualifying provision, and expressed strong doubts as to the application of the Act to such cases. The House wisely declined to pronounce a judgment off-hand upon so dubious a point, and referred the question to a select committee for their opinion. The committee was appointed, consisting of Mr. Walpole (chairman), the Attorney and Solicitor-General, the Lord-Advocate, Lord Hotham, Mr. Disraeli, Mr. George Butt, Mr. Thomas Duncombe, Lord Seymour, Mr. Napier, and Mr. Freshfield. A more competent tribunal, both as regards the lawyers and laymen of whom it was composed, it would have been difficult to select.

After some discussion, the committee found that they could not satisfactorily decide upon Baron Rothschild's rights without hearing the case fully argued on his behalf. They accordingly recommended to the House that he should be allowed to appear before them by his counsel and agents; leave was granted; and Mr. Bramwell (with whom was Mr. Honyman) appeared before the committee. No counsel being heard on the other side, some of the natural inconveniences of an unilateral argument ensued. The lawyers on the committee, whose opinions leaned against the baron, could not be expected to remain altogether passive under Mr. Bramwell's fire. His assumptions on behalf of his client prompted reply from some of those honourable and learned members; and the argument, broken in upon by judicial interpellation, lapsed into a sort of open discussion. The two law officers of the Crown in particular, being divided in their views, gave animation to the debate by pouring in a cross fire of questions and counter-questions. The discussion terminated in the following result. The Solicitor-General moved, "That there was no contract, agreement, or commission between Messrs. Rothschild and Sons, or Baron Lionel de Rothschild and the Commissioners of her Majesty's Treasury, for or on account

of the public service, within the true intent and meaning of the 22 Geo. 3, c. 45." With him voted five members of the committee, viz., Mr. Disraeli, Mr. Thomas Duncombe, Mr. Freshfield, Lord Seymour and the Lord-Advocate. On the side of the *noes* voted the Attorney-General and Lord Hotham; Mr. Walpole, being chairman, did not vote, but was understood to agree with the minority. Mr. George Butt and Mr. Napier were absent. The learned member for Weymouth, we have some reason to think, would, had he been present, have voted with the *noes*. Of Mr. Napier's opinion we have no intimation. Such a result, it may be fairly said, leaves the question still, as it stood before, open to considerable doubt. We believe that any of our readers who may take the trouble to investigate it, will find, in the peculiar circumstances of the case, sufficient cause for the perplexity it has occasioned, and the remarkable conflict of opinion which it elicited. We shall endeavour to assist them to a solution of the controversy, by placing what appears to us to be the true bearings of the case in a clear point of view. In order to this, we shall begin by briefly detailing the *facts* upon which the question arose.

In the month of April last, it was resolved by the Government to raise a sum of 16,000,000*l.*, for the service of the year, by means of a loan. A notice, inviting persons desirous to contract for a loan to attend at the Treasury on a day specified (April 20th), was issued in the usual form by the Chancellor of the Exchequer. On that day Baron Lionel de Rothschild—the only party who appeared to offer for the loan—gave in his tender as follows:—

“ London, 20th April, 1855.

“ SIR,—In conformity with the public notice issued by the Treasury, we have the honour of submitting the following offer for the loan of 16,000,000*l.*

“ We agree to take the whole of the 16,000,000*l.* Three per Cent. Consolidated Annuities, with dividend from the 5th of January last, at *par*, payable in instalments at the periods stated in the said notice, upon receiving for each 100*l.* an annuity of 14*s.* 6*d.* per cent., terminable in thirty years, to commence from

the 5th instant, payable half-yearly; and we are accordingly ready to pay the required deposit upon the same.

“We remain, &c.,

(Signed) “N. M. ROTHSCHILD & SONS.

“To the Right Hon. Lord Viscount Palmerston, and
the Chancellor of the Exchequer,” &c. &c. &c.

Of this tender the Chancellor of the Exchequer, then and there, by word of mouth, intimated his acceptance; whereupon Baron Rothschild signed and handed in to the minister the following instrument, to which we hesitate to give a name, since it is upon the designation properly and legally to be given to it that the argument mainly turned. To describe the document as a “*contract*” is to prejudge the question; but we may be allowed for the sake of convenience, and distinctly without prejudice, to refer to it in these pages as the “*engagement*” of Baron Rothschild. It ran thus:—

“Whitehall, Treasury Chambers, 20th April, 1855.

“We hereby engage with the Lords Commissioners of her Majesty’s Treasury, to subscribe the sum of 16,000,000*l.* in money, for the service of the year 1855, on the following terms, viz.:—

“For every 100*l.* subscribed, to receive 100*l.* Three per Cent. Consolidated Annuities, and an annuity for thirty years of 14*s.* 6*d.*

“The interest on the said Three per Cent. Consolidated Annuities to commence from the 5th day of January, 1855; and the annuity of thirty years from the 5th April, 1855. The dates of payment to be as follows:—

“Tuesday, 24th April, 1855...Deposit of 10 per cent.

„	22nd May	„	Payment of 15	„
„	19th June	„	„ 10	„
„	17th July	„	„ 15	„
„	21st Aug.	„	„ 10	„
„	18th Sept.	„	„ 10	„
„	16th Oct.	„	„ 10	„
„	20th Nov.	„	„ 10	„
„	18th Dec.	„	„ 10	„

"For each instalment after the deposit, a proportional amount of stock and annuity to be credited to the *contributors* in the books of the Bank of England. The stock and annuity for the deposit, and the last instalment, to be credited on payment of such instalment.

(Signed) "N. M. ROTHSCHILD & SONS.

"Witnesses—(Signed) T. M. WEGUELIN,

"Governor of the Bank of England.

"SHEFFIELD NEAVE,

"Deputy-Governor of the Bank of England."

The above engagement was received and adopted by the Chancellor of the Exchequer: everything done by him, as representing the Treasury, being done, as appears, merely by word of mouth, and the engagement being signed on one side only.

The word "*contributors*," in the last paragraph but one of the above instrument, is observable. Who are the "*contributors*?" The Governor of the Bank, being questioned by the committee on this point, informed them that it meant the "*subscribers*." "The names," he said, "were given in *subsequently* by Messrs. Rothschild, who are the *contractors*." This answer is explained by the well-known usage—Messrs. Rothschild are the persons engaging with the Treasury to furnish the money. But the money which they furnish is not, except in a certain proportion, derived from their own funds. Previous to making their tender to the Treasury, they open a list for contributors, who put down their names for such sums as they are severally willing to subscribe. These contributors engage with the contractors to share according to their several proportions the profit or loss, as it may turn out, upon the transaction. *After* the engagement has been accepted, the contractors deliver to the Bank of England a list of the contributors, and scrip receipts are then issued to the latter by the Bank for their several subscriptions. It is in contemplation of this arrangement, well understood by all parties, that the word "*contributors*" finds a place in the engagement above set out.

The next step in the proceedings is a series of resolutions come to by the House of Commons. Assuming for the moment

that the "engagement" of Messrs. Rothschild is something by which *they* are bound, the question arises, *to whom* are they so bound, and who is bound to them in return? Clearly the contractees, if there be any, must be the Commissioners of her Majesty's Treasury. But have the Commissioners any legal power to enter into such a contract? Independently of an authority conferred on them by Parliament, clearly not. Although, however, they were not invested with any such power at the date of the engagement, viz., the 20th of April, yet, if subsequently to that date the Legislature should confer upon them retrospectively the requisite authority to contract, or should ratify the specific agreement which they had made, it may be that the previous defect of power to bind themselves to the contractor would be cured, and the necessary conditions of a legal contract fulfilled. To ascertain this point, let us observe what it is which the Legislature actually does.

On the 20th of April, at a later hour of the same day upon which the Chancellor of the Exchequer and the contractor came to terms, the House of Commons passed six Resolutions. It is needless to set them out at length, but we must carefully examine their effect. The first declared that the sum of 16,000,000*l.* should be raised by annuities. The second and third specified the terms to be granted to the lenders, *i. e.*, the amount of stock in perpetual Three per Cent. Annuities, and also the amount of terminable annuity, with the respective days of payment: those being the precise terms of Baron Rothschild's engagement. The fourth declared that these annuities should be charged on the Consolidated Fund. The fifth regulated the payment of the instalments, these also corresponding precisely with the agreed terms; and it went on to declare that all the moneys so to be received by the Bank of England should "be paid into the account of the receipt of her Majesty's Exchequer at the Bank of England, to be applied from time to time to such services for Great Britain and Ireland as shall then have been voted by this House in this session of Parliament," &c. &c.

The sixth Resolution provided for the redemption of the new stock thus to be erected by means of a sinking fund.

It is material to observe that the Resolutions just recited,

although they embody the very terms of the engagement above set out, contain no mention of or reference to the contractors, Messrs. Rothschild. The second Resolution commences with the words, "*Every contributor* to the said sum of sixteen millions," &c.; and those which follow repeat the words, "*every such contributor*," &c.

The passing of these Resolutions was followed by the payment of the deposit of ten per cent. four days afterwards, viz., on the 24th of April, in accordance with the terms of the Resolutions themselves, and of the original engagement.

In the practice of financial legislation, the Resolution of the House of Commons is the basis on which, for convenience sake, operations take place; but it is needless to say that the authority conveyed by the mere resolution of one House of Parliament is neither final nor binding. An Act of the whole Legislature is needed to give validity to any measure imposing burdens on the subject. If the Commissioners of the Treasury had not already power to guarantee annuities to contributors of money, or to create a charge on the Consolidated Fund, the Resolutions *per se* could convey no such power. But the Resolutions formed, as in all similar cases, the foundation of a Bill, embodying the same arrangements as to amounts and dates of payment, both of the instalments and the annuities, as those previously resolved upon; and this Bill, having received the assent of both Houses and of the Crown, became on the 5th of May the Act of 18 Vict. c. 18, intituled, "An Act for raising the sum of Sixteen Millions by way of Annuities."

Let us now examine narrowly the scope and language of this Act, in order to see what light is thrown by it upon the question arising out of Baron Rothschild's engagement, which may be briefly described as a question of "contract or no contract."

First. Let us observe in the frame of this statute the same peculiarity which we noticed in the Resolutions, viz. the total absence of any notice of Baron Rothschild and his engagement with the Treasury; no recital at the commencement of the Act with reference to this point; no mention at all either of the baron on the one hand, or of the Commissioners of the Treasury on the other, consequently no express and direct ratification of any preceding contract. The Act, in fact, takes up the matter

at a *later* stage of the affair; it sets out from the payment of the deposits by the *contributors*. We know now who those contributors were: they were Baron Rothschild, and the several persons to whom he had assigned shares of the loan. "Whereas," says sec. 2, "pursuant to and upon the terms and conditions expressed in the said Resolution (that of the 24th April before recited), several persons have, in books opened at the Bank of England for that purpose, subscribed together the whole of the said sum of sixteen millions, to be raised by annuities, and made deposits of ten pounds per centum on the respective sums by them so subscribed to the said sum, with the cashiers of the Governor and Company of the Bank of England; it shall and may be lawful to and for such contributors, &c., to advance and to pay the said cashier, &c., the several remainders of the sums by them respectively subscribed towards the said sum of sixteen millions, at or before the respective days and times, and in the proportions hereinafter limited," &c.; setting forth the days for the payment of the instalments, precisely as in the engagement and the Resolutions. Then follow clauses regulating the amount and times of payment of the annuities to such contributors or their assigns; various regulations as to the transfer of the stock, commencement of dividends, &c.; then, clauses charging the annuities on the Consolidated Fund, imposing duties in respect to the management of the debt upon the Bank of England, and annexing the annuities thereby created to the capital stock of the existing Three per Cent. Consols, together with some other subsidiary provisions. The only remaining sections which it is at all material to notice are the 14th and the 24th. The former provides that in case any contributor, having made the deposit of ten per cent., or having paid any instalment, shall afterwards make default in paying up the residue of the sum subscribed, the deposit shall be forfeited for the benefit of the public. This, it should be observed, is the only part of the Act which imposes any penal consequence or liability for default of payment of the subscriptions. The 24th section—which we notice only because it was attempted to draw some argument from it in aid of the baron, but which in our judgment has no bearing at all upon the case—contains a saving clause,

that "The Governor and Company of the Bank of England, or any member thereof, shall not incur any disability for or by reason of their doing anything in pursuance of that Act."¹ We may further clear the ground by assuming a point which was conceded on all hands before the committee, and is, indeed, quite void of doubt, viz., that the Act of Parliament does not *per se* constitute a contract by which Baron Rothschild, or any one else, can be brought within the disabling clauses of the Contractors' Act. If there be no other contract but such as the Loan Act itself contains, or may be supposed to imply, assuredly there is none at all.

For the anomalous circumstance that the Loan Act thus wholly ignores the original contractor, and the engagement entered into by him, a plausible explanation was suggested during the argument by the Attorney-General. "The Act of Parliament," he said, "seems to be based upon certain antecedents, which are well known to Parliament to take place in the course of these public loans, namely, a tender to the Government on the part of some individual, and that that individual, either before or after he makes his tender, opens his list and obtains a certain number of contributors, who take portions of the loan. All that proceeding being familiar to Parliament, from the frequency of loans in this country, Parliament passes an Act. That seems to me to assume all that has gone before." (Report, p. 31.)

We think this explanation a very good one to account for the shape in which the Loan Act is framed; but it does not at all relieve the subject of those legal difficulties which arise in consequence of the peculiar mode of legislation adopted. It being admitted that the Loan Act itself forms no contract, the question arises whether, out of all the elements of the transaction collectively, the engagement, the Resolutions, and the Act, a contract be or be not constituted. Considerable difficulties arise out of either supposition: let us briefly pass them in review.

"The way in which it strikes me," said the Attorney-General,

¹ See the observation of the Attorney-General (Report, p. 49), which effectually disposes of the argument attempted to be founded on this clause of the statute.

addressing Mr. Bramwell, "is this : here is a tender made by Baron Rothschild to supply this 16,000,000*l.* for a loan. The Commissioners of the Treasury accept that tender. Now, I am quite ready to concede to you that they accept that tender, subject to Parliament afterwards consenting to this loan, and passing an Act of Parliament for the purpose. Parliament does so ; it accepts the proposition of the Government to raise the sum of 16,000,000*l.* ; it passes the Act of Parliament to which we have been calling your attention : then, upon what has actually taken place, Baron Rothschild furnishes the 16,000,000*l.* ; because you must impart another element of fact into the discussion, to which you have not adverted, namely, that although there are the contributors to whom the Act refers, yet those contributors contribute their respective shares to the amount of the loan *under the agreement* which Baron Rothschild has undertaken with the Treasury. So that at last, out of all these things—the tender, the acceptance, and the Resolutions of the House of Commons—it ends in this result. Baron Rothschild, partly by himself, and partly by others with whom he enters into an arrangement, in point of fact does produce the 16,000,000*l.*, and has those benefits from it which are involved in the terms entered into between him and the Commissioners of the Treasury. It therefore strikes me that you have him agreeing to furnish, and actually furnishing, a sum for the public service ; that is the way in which it presents itself to my mind, and where I feel a difficulty which I should be very glad to have removed."

To this statement of the matter Mr. Bramwell answered, "Of course I need not say, sir, that that is a way of presenting this case, which to a non-legal mind, or a mind not examining the matter with particularity, would at first give the notion that there was a contract. Undoubtedly, put in the way in which you have been pleased to put it, it is very difficult to say that it has not the appearance of being a contract. . . . But what I am proceeding to do is, to examine the matter strictly and critically, to see what the contract was and where it was."

The Attorney-General.—You are quite right.—(p. 21.)

Mr. Bramwell then proceeded, with his accustomed cogency

and precision of argument, to dissect the provisions of the Loan Act. He pointed out, what appears evident enough on the face of that statute, that "it is not an Act which authorises the making of a contract, or gives the Commissioners of the Treasury the power of doing anything or of making a contract; but it is an Act which *gives certain statutory rights to certain ascertained persons*," viz. the contributors who had paid their deposit and had their names entered in the books of the Bank. It is extremely difficult, certainly, to contend that the Loan Act converts the engagement of Baron Rothschild of April 20th into a "contract" within the provisions of 22 Geo. 3, when the Loan Act does not refer to the baron or his engagement at all. It can hardly be pretended that it vests any authority, prospective or retrospective, in the Commissioners of the Treasury, or that it ratifies any past act of theirs, when it neither alludes to the Commissioners at all, nor to any proceeding whatever affecting the loan, antecedent to the payment of the deposit into the Bank.

The chairman of the committee put the following hypothetical case to Baron Rothschild's counsel:—

"Suppose a person enters into an agreement with the tenant for life of an estate, which that tenant has not the power to sell, except by force of an Act of Parliament, and the intended purchaser signs an agreement of this sort: 'I hereby engage to pay you 100,000*l.* for estate A, and to pay 10 per cent. deposit in a week's time;' and suppose the owner of that estate applies for an Act of Parliament subsequently to enable him to sell the estate, but takes no notice of that agreement entered into between himself and the intended purchaser, and gets authority from Parliament to sell the estate *generally*; may the intended purchaser of that estate, or may he not, enforce that contract against the owner when the Act has passed, conferring the power upon the owner of the estate to sell it?"

It being objected that in the case supposed there would be no mutuality of contract, the Attorney-General suggested the additional ingredient, that the tenant for life actually took the deposit first, and then obtained the Act. It could hardly be disputed that in such a state of circumstances the tenant for

life would have been held bound ; it would have been a good contract at common law. But is the analogy of the two cases perfect? With the learned counsel for the baron, we conceive *not*. According to the case supposed, a provisional contract is entered into conditionally on the tenant for life obtaining a disposing power. He does obtain this power, and the condition consequently attaches. Now, in the case referred to the committee, the Lords of the Treasury represent the tenant for life. They have no power at the time of the engagement to grant annuities out of the Consolidated Fund. But it may be said that they undertake *provisionally* to do so when Parliament shall have clothed them with the power. But does Parliament ever do this? Here is the pinch of the case. Look at the Loan Act, not in the vague, popular "spirit-of-the-act" point of view, but with a critical eye, and in the clear light of legal reasoning, not forgetting that the question is to be decided upon a penal statute, requiring strict construction. From beginning to end there is no *ratihabitio* of a foregone act—no pretence of supplying the hiatus in an inchoate contract. The Act starts from another basis altogether. It recognises and identifies certain parties as having paid deposits, confers on them certain rights, and imposes certain obligations. The Lords of the Treasury, and the member for the city of London, are equally ignored by the statute ; the contracting parties, if contract at all there be, are the supreme Legislature, representing the State on the one side, and the individuals whose names are in the Bank books, and whose deposits are in the Bank coffers, on the other.

We said that there are difficulties in either supposition, contract or no contract. We have pointed out some of those which militate against the former view ; let us now exhibit some of the anomalies which the case presents, assuming that the engagement in question involves no obligatory contract. On the 24th April, the deposits were paid into the Bank. It is an important question, in what right did the Bank then hold them—as the agent of the Government, or as a stakeholder for both parties? The view taken by the Bank authorities is, that they held them on the part of the Government only, and the governor distinctly stated, that if Baron Rothschild, before the passing of

the Act, had demanded repayment of the money deposited by him, they would not have repaid it.¹ But let us see what view the lawyers take of this point. We give the following extracts from Mr. Bramwell's argument, and the interpellations which it met with, because they afford a sample of the perplexing nature of the case, and also exhibit a curious picture of the working out of the argument in the brain of the learned counsel, a subtle and adroit reasoner, and a man by no means accustomed to appear before any tribunal with crude and unsettled views of his subject; yet, in the following passage, we see portrayed, *veluti in speculo*, the ebbs and flows of the learned counsel's cogitations upon one of the most material points in the whole case:—

The Lord-Advocate.—You say that you think you have reason to maintain that the contributors could get back their deposits before the Act passed; but is it not essential to your argument to maintain that?

Mr. Bramwell.—No, sir, with submission, I think not. Supposing I say, I enter into no contract of any sort or kind, but there are 10*l.* which I put into the hands of a stakeholder. I undertake for nothing, but I put 10*l.* in the hands of a stakeholder with this view. Then, if Parliament pass a certain Act, operating upon that 10*l.*, of course it will be subject to the regulations so made by the Act. If they do not pass an act of that sort, it comes back to me.

Lord-Advocate.—Before they do either one or the other, what is to prevent your taking the money again?

Mr. Bramwell.—I have very great difficulty in seeing.

Lord Advocate.—If you cannot do it, it must be in consequence of the right of some other party to prevent you. What right is that?

Mr. Bramwell.—That is using, in a forcible way, the argument which I put upon it.

Lord-Advocate.—All I meant to say was, that that seems to follow from your argument necessarily.

Mr. Bramwell.—*I believe it does so.*

The Attorney-General presently interposed, and read to the

¹ Evidence of T. M. Weguelin, Esq., Report, p. 14.

learned counsel the terms of the fifth Resolution of April 24, which declares that the deposits paid into the Bank shall be paid in to the account of the receipt of her Majesty's Exchequer, to be applied from time to time to such services as shall then have been voted by this House for this Session of Parliament, &c. "If a person pays in his money," observed the Attorney-General, "upon the faith of that Resolution, it is difficult to say that he can get it back again."

Mr. Bramwell then said—"After hearing that read to me, *I would rather withdraw the argument that they could get it back.* It appeared to me that they could get it back, but that having been read to me, it may well be taken that the money is paid in upon those terms. *I am not even now quite sure that it could not be got back,* but if it could not be got back at all, it must be because there is some binding obligation upon those paying it in—what is that binding obligation? Not contract, if I am right. The Resolution of the House of Commons would not make it law. If, therefore, it is binding at all, it is binding because in reality the nation, by the Resolution of the House of Commons, makes this bargain. When I say the nation, I believe I ought not to speak in that way, because the only party capable of binding in the name of the nation is the Crown; but if it is binding, it is because the Crown, through the medium of the Resolution of the House of Commons, makes a bargain of that description. I am not clear that that is so—it has come upon me rather by surprise: I had not seen it; I ought to have been aware of it. *I doubt very much whether the money could not have been got back again,* notwithstanding that Resolution: but supposing it could not be, it must be because it is held fast by virtue of some obligation on the parties who deposited it; which deposit, I say with great deference, is not with the Commissioners of her Majesty's Treasury, or with any other persons named in the 22 Geo. 3, c. 45. I say, therefore, assuming that the money was held fast, it must have been by virtue of that Resolution (*and the more I think of it, the more I feel inclined to doubt that it was held fast*), and not by virtue of a contract with any of the parties with whom contracts are prohibited here."—Rep. p. 34.

This is a curious passage. Such hesitancy and fluctuation of opinion in a lawyer of such clear judgment as Mr. Bramwell indicates pretty clearly the difficulties of his position, and the extreme peculiarity of the case.

But the most singular anomaly that marks the case—if the position be a sound one, that the transaction of the Treasury with Baron Rothschild was no contract, and that the engagement of the 20th April was set aside and superseded by the provisions of the Loan Act—is this:—If Baron Rothschild was not bound to the Treasury, nor the Treasury to Baron Rothschild, by what had passed between them, the idea of that person or his assigns having any exclusive rights to the benefit of the loan is completely set aside. The bargain indeed was his, but he had no security whatever for his bargain. If there was likely to be a profit on the speculation—if the scrip had risen to a good premium between the 20th April and the 24th, what was to prevent any other person or persons anticipating the baron at the Bank and ousting him of his gains? The Resolutions of the House of Commons recognised no exclusive or special right in him—they are couched, like the Act which carried them out, in the most general terms. “*Every contributor*,” said Resolution 2, “to the said sum of sixteen millions shall, for every 100*l.* contributed and paid, be entitled, &c.” “*Every contributor*,” said Resolution 5, “shall, on the 24th day of April, 1855, make a deposit of 10 per centum on such sum as he or she *shall choose to subscribe* towards raising the said sum of sixteen millions, &c.” This unlimited expression, “every contributor,” opens a door wide enough for any of the public at large to enter, without seeking admission by means of the golden key of Messrs. Rothschild. It may be suggested that the authorities of the Bank of England would refuse to receive any deposits except those made by Baron Rothschild or his transferees. But the question is not one of practice, but of law. Could the Bank legally refuse to receive a deposit from any person who claimed a right to subscribe his money under Resolution 5, and tendered his 10 per cent. on the morning of the day specified? This is a very serious question: it is one which Mr. Bramwell did not shrink from, but confidently answered

in the negative. "My argument is," he said, "that Baron Rothschild had no right of any sort or kind."—p. 35. And again, "I do venture to submit that, according to law, the Chancellor of the Exchequer might, the very day after these Resolutions had passed, have sent down word to the Bank of England—'Do not you take any money from Baron Rothschild, or anybody else coming with scrip issued by him, but take it from Messrs. Baring, or from people coming with scrip issued by them.'" If this be a correct view of the matter, certainly a loan-contractor might find himself, according to the present arrangements, in a very awkward predicament. He might discover that, however profitable the terms he had made, there was no security whatever for his obtaining the fulfilment of them: other parties, with the Act of Parliament in their hands, and more on the alert than himself, might step in before him, and entitle themselves to the benefit of the transaction. Such a view of the effect of our present mode of legislation in regard to loans may appear strange and repugnant to common notions of equity, but we should be glad to see any lawyer who, after examining the precise terms of the Resolutions, and of the Loan Act, would point out the flaw in Mr. Bramwell's reasoning upon this part of the case.

The dilemma is a simple one. Either there was a valid and binding contract between Baron Rothschild and the Commissioners of the Treasury, or there was not. If there was such a contract, it vacated his seat in Parliament; if there was not, Baron Rothschild had no prior or exclusive right to take advantage of the terms of the Loan Act. Whatever benefit was to be gained from it was equally open to the public at large. Any man who "chose to subscribe" might become a "contributor," and entitle himself to the annuities for which the baron had stipulated for the benefit of himself and his assigns.

On the other hand, if the Treasury was not bound to the baron, neither was the baron bound to the Treasury. Had any event occurred leading to a fall in the money market in the period between the 20th and the 24th April, it was open to the contractor to recede from his engagement, to leave the Chan-

cellor of the Exchequer in the lurch, and to stultify the Resolutions of the House of Commons. Nay, if at any time after the 24th, and before the passing of the Loan Act, circumstances had occurred to make the bargain undesirable, it was still open to the contributors, according to Mr. Bramwell's latest impression, to withdraw the deposits from the Bank of England, and to upset the financial arrangements of the Government.

The decision of the committee of the House of Commons was, that the negotiation between Baron Rothschild and the Treasury did *not* amount to a contract within the 22 Geo. 3, c. 45. Their conclusion is thus expressed in their report: it was unnecessary for them to decide whether the transaction amounted to a contract at common law; the seat would not be affected unless it were a contract of the particular nature which the Act described. But those who carefully examine the terms of that statute will probably have little difficulty in satisfying themselves that, if the engagement in question had contained all the requisites of a legal contract, mutually binding and final between the parties, such a contract would have been within the meaning, as it is clearly within the mischief, of the Act of Geo. 3. We take the decision, therefore, as practically negating the existence of any contract at all. Upon the whole, we are not prepared to impugn the judgment of the committee. The question is, to say the least, open to considerable doubt. The statute is highly penal, and, therefore, justifies a strict construction. The side to which the committee leaned is probably the safe one. But the consequences of the decision are certainly rather grave. If the document signed by Baron Rothschild created no contract, it conferred no rights. It bound neither that individual nor the Government. Either party had the power to recede. Other capitalists might have supplanted Baron Rothschild, and entitled themselves, by more prompt payment of the deposit, to the benefit of his tender. Baron Rothschild might have receded from his own proposal, had events made it disadvantageous to him. On the other hand, the Government might have thrown the baron overboard, and taken the money from any other contractor, had more favourable terms been offered to them, or

had they been influenced by those particular motives which the act of Geo. 3 had in view, and which it was intended to counteract.

Whether the present method of contracting and sanctioning public loans, anomalous, lax, and uncertain as it thus appears to be, might not be altered with advantage, and put upon a more secure and definite footing, it is for the wisdom of Parliament to consider. Another question, into which we must at present refrain from entering, but which might well engage the attention of the Legislature, relates to the general policy of the Act of Geo. 3,—whether it be still necessary or expedient to enforce those disqualifications against contractors, which originated in a former generation in a jealousy of the power of the Crown.

One proposition, at least, appears to us not doubtful. If contractors generally are unfit to sit in Parliament, loan-contractors ought to form no exception to the rule. The possible mischief in their case is at least as great as in any other. If history be appealed to, we believe it will be found that the very instances in which political motives have operated, and ministerial favour has influenced contracts most flagrantly, have been the transactions with money-lenders. A “slice of the loan” was found, in days of less scrupulous morality than the present, an easy bribe to an opponent, or a convenient bonus to a partizan.

It is a curious circumstance in the history of the very statute we are now considering, that while it was in progress through the House of Commons, an endeavour was made to engraft an exception upon its provisions in favour of loan contracts. The amendment was opposed, on the express ground that they were the special mischief intended to be prevented, and it was ultimately withdrawn, “it being generally understood,” says the parliamentary history, “that a separate bill would be brought in for that purpose.” This, however, was never done. It appears, therefore, to have been clearly the opinion of the Legislature, at the time of its passing, that the Bill applied equally to loan as to other contracts. It has indeed been ingeniously suggested by Mr. Bramwell, that the fact of nothing having been done afterwards to exempt this class of transactions, indi-

cates an opinion, on the part of those who wished to make them an exception, that the matter was tolerably safe according to the true construction of the statute as it stood. It is certainly rather singular, that although Parliament deliberately rejected the proposition to except loans from the Bill, yet almost immediately after the Act passed, we find loans contracted to which members of the House of Commons notoriously contributed, yet retained their seats without question. As to this point, the interesting evidence given to the committee by Mr. James Wilson, the Secretary to the Treasury, is clear and conclusive. The only mode which occurs to us of accounting for the inconsistency, is that which was suggested during the recent argument by the Attorney-General. It appeared from Mr. Wilson's statement, that although the Act passed in 1782, and loans were raised in 1783, 1794, and several subsequent years, yet that no memorandum of any *contract* for a loan prior to 1801 could be discovered in the records of the Treasury. All that appeared to have been done in the case of the loans contracted for the first nineteen years after the passing of the Act was, that there were lists of the contributors. These lists—mere rolls of names, with the sums subscribed set opposite—have been preserved, and were produced to the committee. "May not the fact," suggests the Attorney-General, "of there having been no agreement, but simply a list of contributors, arise from the circumstance that it was a contrivance, resorted to for the express purpose of avoiding the consequences of the Act?" The explanation appears not improbable; it affords, at least, some solution of a striking inconsistency. The whole subject well deserves further elucidation. We shall be glad if the observations we have now offered in any degree contribute to that result.

G. K. R.

ART. III.—SOME REMARKS ON THE WRIT OF
HABEAS CORPUS AD SUBJICIENDUM, AND THE
PRACTICE CONNECTED THEREWITH.

THE liberty of the subject has from the earliest time been protected by our common law, as evidenced by the celebrated 29th chapter of Magna Charta, which declares (for it is but declaratory of the law) that, "No freeman shall be taken or *imprisoned*, or disseised of his freehold or liberties, &c., or be any otherwise destroyed, &c.," *nisi per legale iudicium parium suorum vel per legem terræ*. "No man," says Lord Coke in his commentary upon the above chapter of Magna Charta, "shall be *taken*, i. e., restrained of liberty, by petition or suggestion to the King or his Council, unless it be by indictment, or by presentment of good and lawful men" (2 Inst. 46). Thus much as to the great principle of personal freedom recognised by our law. Then as to the remedy for its invasion. "If," says the same authority (4 Inst. 290), speaking of the forest laws, "if it be demanded—what if a man be unjustly imprisoned under colour of those laws, and afterwards offer sufficient pledges, and they be not taken, what remedy is there for the plaintiff? The answer is, that in the term time he may have, *ex merito justitiæ*, a *habeas corpus* out of the King's Bench, or out of the Court of Common Pleas, or of the Exchequer; or out of the Chancery, either in term time or vacation; and upon the return of the writ he shall be bailed." So in the Institute just cited (fo. 182), after designating as "odious" the unjust imprisonment or detaining of any freeman in prison; after mentioning various remedies now obsolete which "the law hath allowed for the relief and ease of the prisoner," Lord Coke adds, "*but the readiest way of all* is by *habeas corpus*, in the term time, or in vacation, out of Chancery." And to return once more to the 2nd Inst. (fo. 55), we there read: "Now it may be demanded, if a man be taken or committed to prison, *contra legem terræ*, what remedy hath the party grieved? To this it is answered—

1st, That every Act of Parliament made against any injury, mischief, or grievance, doth either expressly or impliedly give a *remedy by action* to the party wronged. 2ndly, The party falsely imprisoned may *indict* for the injury done him. 3rdly, He may have a *habeas corpus*—upon which writ the gaoler must return by whom his prisoner was committed, and the cause of his imprisonment; and if it appeareth that his imprisonment be just and lawful, he shall be remanded to gaol; but if it shall appear to the Court that he was imprisoned against the law of the land, they ought, by force of this statute (*Magna Charta*), to deliver him; if it be doubtful, he may be bailed.

Various cases, ancient and modern, both prior to and since the Habeas Corpus Act, might be cited to show that the writ of which we are now speaking lies at common law. "This invaluable writ," says Lord Campbell (*Ex parte Sandilands*, 21 L. J., Q.B. 342), "could always be obtained where a person had been improperly deprived of liberty. From the earliest times, before the Habeas Corpus Act, a writ issued in such cases, calling upon the party detaining to show if any just cause existed for the detention—but this was always on the supposition that liberty was interfered with."

In *Thomlinson's Case* (12 Rep. 104), we have an instance of *habeas corpus* at common law. It there appears that the said Thomlinson had been committed by the Court of Admiralty for refusing to answer on his oath to certain interrogatories proposed to him in a suit there instituted; and accordingly he brought his *habeas corpus*, to which the marshal of the prison of the Admiralty returned, that his prisoner "had contumaciously refused to submit himself to examination;" and this return was held to be insufficient, on the ground that it was too general, and because it did not specify for what cause or matter the prisoner had been examined. (See also *Bourn's Case*, Cro. Jac. 543; a mem. in Cro. Car. 466, for allowing prisoners confined in certain gaols who could give bail to go at large when the plague was prevalent in London; *Ex parte Besset*, 6 Q.B. 481).

Long, indeed, before the time of Coke the writ of *habeas corpus* may be clearly proved to have been in use, and in the reign of Henry VI. "it seems to have been familiar to, and

well understood by the judges," as remarked by Mr. Fry, in his learned and interesting dissertation upon the writ of *habeas corpus*, prefixed to his Report of the Canadian Prisoners' Case, p. 7. (Reported also as Leonard Watson's Case, 9 Ad. & E. 731; and *Re Parker*, 5 M. & W. 32.)

An examination of precedents has moreover shown that the remedy by *habeas corpus* was originally used as between subject and subject, rather than by a subject against the Crown; but from the reign of Henry VII. cases are to be met with in which the writ was sued against the Crown; and in the reign of Charles I. the arguments in Sir Thomas Darnell's Case, 3 State Trials, p. 1, show that the nature of this writ as an admitted constitutional remedy was at that time well appreciated. The case just cited, as the learned reader need not be reminded, led the way to the Petition of Right (3 Car. 1, c. 1), which contains an emphatic protest against the denial of the writ of *habeas corpus*, and against illegal imprisonment thereby occasioned. (See ss. 5, 10; see also Hallam's Constitutional History, vol. 1, p. 414, &c.)

The writ of *habeas corpus ad subjiciendum*, with which we are on this occasion exclusively concerned, is, to use the words of Blackstone, "the great and efficacious writ in all manner of illegal confinement. It is directed to the person detaining another, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive, whatsoever the judge or Court awarding such writ shall consider in that behalf." (3 Bla. Com. 131.) In order, however, to justify issuing the writ at common law, it must be shown that liberty is being interfered with—that the party on whose behalf the application professes to be made is coerced, and not a free agent. The writ in question accordingly will not be granted on the application of a man to bring up the body of his wife, unless it be shown that she is under coercion, or subjected to imprisonment—this case obviously differing from that of an infant, whose parent has the right to the custody of the child, so that if of tender years the Court will order it to be delivered to the father—but the husband has at common law no such right to the custody of his wife (*Ex parte Sandilands*, 21 L. J.

Q.B. 342). *Re Hakewill* (12 C. B. 223), indeed, is a distinct authority to show that the father is legally entitled to the custody of his legitimate infant children. "The case of illegitimate children obviously stands upon a totally different footing" (Id. per Cresswell, J.). In *Re Lloyd* (3 M. & Gr. 547), a writ of *habeas corpus* had been obtained by the mother of an illegitimate female child, for the purpose of bringing her up from the custody of a party with whom she had been placed by her putative father. The child, about eleven years of age, was thereupon brought into Court in obedience to the writ, and was asked if she wished to go with her mother, and expressing a disinclination to do so, was allowed to retire with her attendant. This case forcibly illustrates the general rule that a *habeas corpus* will be granted only where the party on whose behalf it is applied for is under coercion or restraint. So in *Ex parte Child* (15 C. B. 238), a rule having been obtained or a *habeas corpus* to bring up a lunatic, confined in an asylum in this country under Irish medical certificates, the Court discharged it with costs, there being no affidavit to show that the party promoting the application was duly authorised by the lunatic. "A mere stranger," remarked the Chief Justice of the Common Pleas, "has no right to come to the Court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by *habeas* to be discharged from restraint."

There does not appear, however, to be any technical or arbitrary restriction in regard to the purposes for which the writ which we are now considering may issue. It is due to any person complaining of unlawful detention, and is employed for the purpose of removing prisoners, of bringing them up *to be bailed*—of bringing up infants improperly detained, &c. &c. (*Re Belson*, 7 Moore, P. C. Cas. 114); the form of writ of *habeas corpus* having anciently varied according to the precise object for which it was required. Before the writs were in English, when the object was to remove a prisoner, this writ was expressed to be *ad faciendum et recipiendum*, &c.; "to do and receive, &c.," as is now expressed in the writs issued by the Courts of Common Law for the like purpose.

Where the object was to remove or bring up a prisoner in custody of the sheriff, gaoler, &c., the writ commanded that the prisoner should be brought before the Court wheresoever it then was, "with the cause of his detention," &c.; whereas, where the object was the bringing up infants or others detained in private custody, the party detained was to be brought before the Court or judge on a particular day, and at an hour and a particular place named in the writ; and the clause *cum causis* was omitted. Of late years there are abundant precedents of this in the case of bankrupts committed by commissioners, infants withheld from parents and guardians, &c. (See per *Ld. Langdale*; *Re Belson*, *supra*; *Corner's Pr. of Crown Off. App.* p. 63; *Tidd. Forms*, 8th ed. p. 123; *Exparte Crowley*, 2 Swanst. 48).

The Habeas Corpus Act (31 Car. 2, c. 2), as, indeed, its preamble distinctly shows, only enforced the Common Law. It applies exclusively to the case of a person imprisoned for a "*criminal or supposed criminal matter*," and enacts—That on complaint and request in writing, by or on behalf of any person committed and charged with any crime (unless committed for treason or felony, expressed in the warrant, or convicted or charged in execution by legal process), the Lord Chancellor, or any judge, shall, on viewing a copy of the warrant, award a *habeas corpus* for such prisoner, immediately returnable; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the charge. That the writ shall be returned to the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days. That officers and gaolers, neglecting to make due returns, shall be fined. That no person once delivered by *habeas corpus* shall be recommitted for the same offence. That any prisoner may move for this writ in Chancery, or in any Court of Common Law, and that the Chancellor or judge denying the same shall forfeit to the party grieved the sum of 500*l.*

A few remarks suggest themselves in reference to the above-named statute of Car. 2. "It is," says Mr. Hallam (*Constitutional Hist.* vol. ii. p. 352-3), confirming what has been already stated in this article, "a very common mistake to suppose that this statute of Car. 2 enlarged in a great degree our liberties,

and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt." "It was not," as the same learned writer further observes, "to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charta, that the statute of Car. 2 was enacted; but to cut off the abuses by which the Government's lust of power, and the servile subtlety of Crown lawyers, had impaired so fundamental a privilege."

Again, it is clear, from the whole scope of the above-mentioned statute (31 Car. 2, c. 2), that it applies to and regulates the right to the writ of *habeas corpus*, in criminal or supposed criminal cases only; and that it has for its principal object the causing persons in custody in such cases to be brought to trial. The statute, therefore, has no application, save where a party has been imprisoned and is in custody on some charge for which he is liable to be tried. It does not extend to the case of one in custody under process issued in a civil cause. Nor does it even apply where a person is in custody under a commission of rebellion, issued out of Chancery, for not appearing in a suit. (*Cobbett v. Slowman*, 9 Exch. 633; affirming *S. C.* 4 Exch. 747). The statute 56 Geo. 3, c. 100, however, extends the remedy by *habeas corpus* to other than criminal cases; for it enacts that persons confined otherwise than for some criminal matter, or by process in any civil suit, may, on application to a judge in vacation by affidavit, showing probable and reasonable ground for his interference, obtain a writ of *habeas corpus*.

The writ of *habeas corpus ad subjiciendum* is not grantable, either at common law or under the statute of Car. 2, as of course, and without any cause being shown for granting it to the Court: the application must be supported by affidavit, setting forth some ground for it, on which the Court may exercise its discretion (*Hobhouse's Case*, 3 B. & Ald. 420). Assuming that such ground is shown, the ordinary modern practice seems to be to grant, in the first instance, a rule to show cause why the writ in question

should not issue; though, under peculiar circumstances, the writ will be allowed to go immediate, as in *Ex parte Witte* (13 C. B. 680), where the writ was granted on the application of the father of an infant of tender years, commanding the mother, from whom the applicant had been divorced, to produce the child; the affidavit in support of the motion stating, that if notice thereof were given to the other parties, the child would probably be removed beyond the jurisdiction of the Court. In the case here mentioned, the writ was handed up to the Chief Justice, and signed by him in court.

The writ of *habeas corpus* is a prerogative writ, and by the Common Law it lies to any part of the king's dominions, for the king ought to have an account why any of his subjects are imprisoned (Bac. Abridg. Hab. Corp. B. 2). In *Rex v. Cowle* (2 Burr. 834, 6), Lord Mansfield states very concisely the territorial limits within which this writ may run. He says:—"To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court (Queen's Bench) has no power to send any writ of any kind. We cannot send a *habeas corpus* to Scotland or to the Electorate (Hanover), but to Ireland, the Isle of Man, the Plantations, and to Guernsey and Jersey we may; and formerly it lay to Calais, which was a conquest, and yielded to the Crown of England by the treaty of Bretigny," concluded, in 1360, by Edward III. with the Crown of France. In *Crawford's Case* (13 Q. B. 613), it was, in express accordance with this opinion, held that the writ would run to the Isle of Man. And that the writ of *habeas corpus ad subjiciendum* has legal force in the island of Jersey, and must be obeyed there, was established in *Carus Wilson's Case* (7 Q. B. 984). "Nor," says Lord Denman, in that case, "can we (the Court of Queen's Bench) be parties to the encouragement of any doubt whether the inconveniences that may possibly arise in giving effect to the writ will justify us, or any judge who may possess the power, in declining the exercise of it in behalf of any person who lawfully requires it."

The question whether or not the Lord Chancellor can issue this writ in vacation was much discussed in *Crowley's Case* (2 Swanst. p. 1), where Lord Eldon came to the conclusion that

it could then issue; for the writ of *habeas corpus* is a very high prerogative writ, by which the king has a right to inquire the causes for which any of his subjects are deprived of their liberty—a liberty most especially regarded and protected by the common law of this country. And, as Lord Coke says, in his Reading on Magna Charta (2 Inst. 53), this writ is to be granted at all times out of the Court of Chancery, for that Court is *officina justitiæ*, and is ever open, and never adjourned, so as the subject being wrongfully imprisoned may have justice for the liberty of his person, as well in the vacation time as in the term. Similarly, in *Re Belson* (7 Moore, P. C. Cas. 114), it was held that the Lord Chancellor, or the Court of Chancery in England, has, by its common law jurisdiction, authority, as general as the Common Law Courts have, to issue writs of *habeas corpus*, and can issue such writs in vacation, “when it is supposed, at least, that such writs cannot be issued by the other Courts” (Judgmt. Id. 131, citing 2 Inst. 53, 55; 4 Inst. 81, 182); a remark, however, which is directly opposed to the considered judgment of the Court of Queen’s Bench, in the Canadian Prisoners’ Case, where the right of a judge of that Court to grant this writ at chambers in vacation time was distinctly asserted, and where in so deciding Lord Denman says, “We deserve herein neither the praise nor the censure that may belong to innovation: we are merely abiding by an established practice;” and his lordship refers to various ancient precedents of writs so issued. After the above decision of the Court of Queen’s Bench, sustained by the authorities therein cited, it is certainly rather singular to find Lord Langdale remarking, in *Re Belson*, to the effect above indicated.

Assuming that the writ of *habeas corpus* has issued, it will not be quashed for matter that can be properly returned to it. “As a general rule, that is certainly the most convenient course, most just to the party applying for the writ, and most in furtherance of the great object for which our constitution has appointed it” (7 Q. B. 1001). The return to the writ, being then made in due course, must specify the cause of detention, and must distinctly set forth the grounds on which the prisoner is kept in custody. It varies, therefore, according to the circumstances of the case.

On the return day of the writ, the prisoner is brought up and produced before the Court; and if the inadequacy of the return is to be argued, the prisoner's counsel will thereupon contend against its sufficiency, and move the discharge of the prisoner. The counsel supporting the return is then heard, and the prisoner's counsel replies, upon which the Court either remands, or, if the return be bad, discharges the prisoner (*Reg. v. Baines*, 9 Ad. & E. 213 n. ; *Re Douglas*, 3 Q. B. 825 ; *Re Peerless*, 1 Q. B. 143 ; *Hammond's Case*, 9 Q. B. 92 ; *Seth Turner's case*, Id. 80 ; *Tordoft's case*, 5 Q. B. 933).

Many cases are to be found in the books, which throw light upon the nature of the return which should be made to a writ of *habeas corpus*, and the degree of sufficiency required in it. Before considering some of these cases, however, we may remind the reader that the statute (31 Car. 2, c. 2) is binding upon all persons whatsoever who have prisoners in their custody; and it is therefore competent for the judges to have before them persons committed by the Houses of Parliament for contempt. It has, however, been established, that the cause of commitment by either House for breach of privilege, or for contempt, cannot be inquired into by Courts of Law, but that their "adjudication is a conviction, and their commitment in consequence an execution." Nor, indeed, could any rule different from that just stated be adopted consistently with the independence of either House of Parliament (*Case of the Sheriff of Middlesex*, 11 Ad. & E. 273 ; May's "Law of Parliament," 2nd ed. p. 69, *et seq.*).

The proceedings in connection with the writ of *habeas corpus*, and the return thereto, were much investigated in the Canadian Prisoners' Case (9 Ad. & E. 731). The return to the writ of *habeas corpus* is there contrasted with a special plea of justification in an action for false imprisonment, in this manner:—The Court observe that a party wrongfully imprisoned has two modes of proceeding,—one, by bringing his action for false imprisonment against the party who has him in custody; the other, by applying for a writ of *habeas corpus*. If he proceeds by action for false imprisonment, the defendant must either set out his ground specially in his plea, or, if allowed, in evidence; but either way, he will be bound to prove the truth of all the facts put in

issue,—*i. e.*, he will have to establish the truth of every fact material to show the legality of the imprisonment. When, however, the party aggrieved proceeds not by action, but by applying for a writ of *habeas corpus* in a summary way, it will not be right for the defendant bringing up the body to specify all matters accounting for the custody with the same minuteness as in an action for false imprisonment. Nor is it necessary that the return should be verified by affidavit. Should the return, indeed, *primâ facie*, appear untrue in any particular, the party making such return will have to account for it, and to state or explain why he has so dealt with the Court; and this he will in practice be required to do, in answer to a rule *nisi* for an attachment granted against him (Canadian Prisoners' Case, Fry's Rep. p. 91). But, still, it does not seem to follow, that though the return be false, an attachment will be granted, provided the party implicated can show that there has been some mistake or misconception on his part, or something to protect him from the expression of its displeasure by the Court. If such cause be shown, an amendment will probably be allowed in the return, so as to make it accord precisely with the facts.

If the *return* to the writ be bad, the Court may allow, or even order, an amendment to be made. In *Re Power* (2 Russ. 583), where the return to a *habeas corpus* set forth a warrant of commitment imperfectly, Lord Eldon, after motion to discharge the prisoner, consulted the Chief Justice of the Queen's Bench on the question of amendment; and the opinion of those learned persons was, that the Chancellor could and should order the gaoler to amend his return, by annexing thereto a copy of the warrant in question, or the warrant itself; "and in that case," Lord Eldon observed, "it would be a strong thing to say that the merits of a committal are to be tried merely by the return to the writ, however erroneous that return may be. If such were the rule, then the person who makes the return to the writ would, in fact, by making a return short of the truth, assume to himself the power of discharging a prisoner who may have been properly committed." Upon this opinion the Court of Queen's Bench acted, in *Re Clarke* (2 Q. B. 619). The Canadian Prisoners' Case, as remarked by Jervis, C.J., in *Re Hakewill* (12

C. B. 228), does, however, seem to show that the return to a writ of *habeas corpus* must be taken to be true, and need not be verified by affidavit. It was, indeed, doubted in that case whether there be *any* mode (other than by action) of impeaching the truth of such return, or of introducing new matter. Were it not for this decision, one might have thought that it was competent to the party at whose suit such a writ is obtained, to impeach the return upon affidavit, or to traverse it, and go to a jury, as well as to argue upon the return that it does not justify the detention.

Upon this part of our subject the practice of the superior Courts may perhaps be considered as not altogether settled, nor so far as it is settled does it seem to rest on a very satisfactory basis. Cases do no doubt occur in which, after the return to the *habeas*, fresh matter may be brought before the Court by affidavit: thus, if the return set forth a commitment under the warrant of justices of the peace good on the face of it, it will be competent to the prisoner to show by affidavit that the arrest took place on a Sunday, and was illegal under the statute 29 Car. 2, c. 7, s. 6; for "if that were not so, all privilege would be totally unavailing, and a party arrested upon a good warrant, under circumstances which made the arrest illegal, would have no means of obtaining his liberty" (*Re Eggington*, 2 E. & B. 717, 729, *Swan v. Dakins*). It is, however, quite clear that the return to a *habeas* cannot under any circumstances be traversed (*Corner's Cr. Off. Pr.* pp. 116, 117). And whether a writ of *habeas corpus* be at common law, or within the provisions of the statute 56 Geo. 3, c. 100, it is not every affidavit that can be received on the return to the writ. Counsel, therefore, who apply for time to file affidavits, must suggest to the Court their nature. In *Dimes's Case* (14 Q. B. 554), the return to a writ of *habeas corpus*, directed to the keeper of the Queen's Prison, set forth an order of committal of the prisoner by the Vice-Chancellor of England, for breach of an injunction granted by the Lord Chancellor. And on motion for time to file affidavits, with a view to showing that the Chancellor was personally interested in the matter before him, and that his injunction was void, the Court observed: "The return shows a

committal by a Court of *competent jurisdiction, acting within its jurisdiction*. The attempt is to show that that Court should not have adjudicated as it did. It has, however, been decided that the Courts of Common Law will not sit in review of a committal by the Court of Chancery." (See also *Clarke's Case*, 2 Q. B. 619; *Ex parte Andrews*, 4 C. B. 226.)

In *Carus Wilson's case* (7 Q. B. 984), the return to a writ of *habeas corpus*, directed to the Viscount and Gaoler of the Island of Jersey, stated that the prisoner was in custody by virtue of the sentence of the Royal Court at Jersey, passed upon him for a contempt, in conformity with the law there in force, as set out in the return. It was proposed to show by affidavit that the law was untruly set forth; but it was held that this could not be done, "for," said Lord Denman, "when it appears that the party has been before a Court of competent jurisdiction, which Court has committed him for a contempt or any other cause, I think it is no longer open to this Court to enter at all into the subject matter. If we were to do so, we should constitute ourselves a Court of Error from such other Court, and should be constantly examining whether the circumstances, the existence of which was proved, warranted the opinion which such Court had formed. Suppose a party were convicted of murder, and ordered to be executed in three weeks, could we, while he was awaiting the execution of his sentence, receive a statement that he was improperly convicted, that evidence was improperly admitted, or that the offence was not murder? The security which the public has against the impunity of offenders is, that the Court which tries must be considered competent to convict." Hence the principle of the exception which runs through the whole law of *habeas corpus*, viz. that the form of writ does not apply where a party is in execution under the judgment of a competent Court (7 Q. B. 1008-9).

Crawford's Case (13 Q. B. 613), clearly affirms the doctrine, asserted in *Carus Wilson's Case*, viz. that one of the superior Courts will not constitute itself a Court of Appeal to discuss the propriety of a committal for contempt by an inferior or local Court, provided the form of commitment be good, according to the law of the place where it was made, however much such

law may differ from that which is here recognised. On referring to *Carus Wilson's Case*, it will be seen that the commitment there was for an alleged contempt in open court; whereas, *Crawford's Case* clearly establishes that a Court of Record has not merely such power vested in it, but also that of committing for a contempt in publishing, whilst the Court is *not* sitting, a libel upon its proceedings.

Again, in *Brenan's case* (10 Q. B. 492), a writ of *habeas corpus* was issued to the Governor of Millbank Prison, and the return thereto set forth that the individuals on whose behalf the writ was moved for, had been convicted in the Royal Court of Jersey of the crime of breaking into a shop by night, and stealing therein, that Court being competent to try and punish for such offence; that the Court had passed a sentence of transportation upon the prisoners; and that the Secretary of State had issued his warrant for removing the prisoners from Jersey to Millbank, with a view to carrying the said sentence into effect. This return was objected to, on the ground that the power of the Court of Jersey to punish by transportation was not shown; but to this Lord Denman answered, "We think that the Court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the Court to pass the sentence to be set out by the gaoler upon the return. We are bound to assume *prima facie* that the unreversed sentence of a Court of competent jurisdiction is correct; otherwise we should in effect be constituting ourselves a Court of Appeal, without power to reverse the judgment."

On the same principle the Court of Common Pleas has refused a *habeas corpus* to bring up a prisoner under sentence of the Court of Queen's Bench for a misdemeanor, in order that the validity of the warrant under which he was committed might be discussed; the proper remedy in such a case being by writ of error (*Re Dunn*, 5 C. B. 215). "If," said Wilde, C.J., "we were to accede to this application—which certainly is one of the first impression—it would lead to consequences that never were contemplated. It would follow that every sentence pronounced by the Court of Queen's Bench would be subject to be reviewed

summarily even by a judge at chambers." So, if the Court of Bankruptcy refuses a certificate of conformity, the Court at Westminster will not, on motion for a *habeas corpus*, inquire into the refusal (*Re Cowgill*, 16 Q. B. 386; *Ex parte Partington*, 6 Q. B. 649; see also *Ex parte Bradbury*, 14 Q. B. 15). In Catherine Newton's Case (13 Q. B. 716), an application was made to the Court of Queen's Bench under the following circumstances:—The prisoner had been put on her trial for murder, and the jury had been discharged by order of the judge, not being able to agree upon a verdict. The prisoner was remanded to gaol, and thereupon the Court was moved for a rule calling upon the prosecutor of the indictment to show cause why a *habeas corpus* should not issue to the keeper of the gaol, commanding him to bring up the body of the prisoner. After cause had been shown for the Crown, the Court discharged the rule, on the ground that the original warrant of commitment remained still in force, not having been affected by the proceedings at the trial, and that the custody in which the prisoner was, was consequently legal. And lastly, in *Re Newton* (16 C. B. 97), the Court of Common Pleas refused to grant a *habeas corpus* to bring up the body of a prisoner who had been convicted at the Central Criminal Court, on the ground that the offence charged had in fact been committed at a place out of the jurisdiction of that Court. The proper course in such a case is to apply to the Attorney-General for his fiat for a writ of error *coram nobis*, on the ground that there is error in fact de hors the record; the Attorney-General having a discretion to grant or to refuse the application; which is not to be granted capriciously or as a matter of course.

The cases just cited will sufficiently show the nature of the return most commonly made to the writ of *habeas corpus*. And now we will attempt to recapitulate some of the more important conclusions respecting the writ of *habeas corpus ad subjiciendum*, to be drawn from what has been above said. This writ may issue either at common law, or under the statute of Car. 2, or that of Geo. 3; and difficulty sometimes exists in satisfactorily determining from which of these sources (if such an expression be permitted) the writ in any particular case

ought to be regarded as proceeding. It is, however, essential to look narrowly at any reported decision with reference to this precise point, before attempting to draw from it any inference. Again, the writ itself will issue not of course, but on reasonable ground shown by affidavit, and will vary somewhat in form, according to the circumstances under which the detention or imprisonment complained of has occurred. Nor, when once issued, will the writ be quashed for matter which can properly be returned to it. Assuming that it is regular, the ground of detention must be set forth in the return: if insufficient or manifestly false, the return must be quashed, and the prisoner will be discharged; or, if the facts justify such a course, an attachment will be allowed to issue against the party making the return. It may, perhaps, be said, and would undeniably be true, that the absence of a right of traversing the return to a writ of *habeas corpus* detracts—in practice somewhat—in theory very considerably—from its efficacy as a remedial process; and yet, though defective as a remedy in some respects it be, in this writ, known only to us and to our brethren of the United States of America, we think we recognise the surest safeguard for the subject against the licence of the Crown—the most obvious and approved pledge for the observance of that duty which is imposed on our judges by those memorable words of *Magna Charta*—*nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum*—justice shall neither be delayed, denied, nor sold, but shall be administered impartially to all.

ART. IV.—PERSONAL PROTECTION ACQUIRED THROUGH BANKRUPTCY AND INSOLVENCY.

Remarks on the Right of Personal Protection acquired through Bankruptcy and Insolvency, and the Contempt of it by certain County Courts.
By William John Law, Esq., Her Majesty's Chief Commissioner for the Relief of Insolvent Debtors.

THE question here treated is one of the deepest importance, and has for some time past attracted attention, though without receiving adequate consideration. In the publication before us, the true premises on which it rests are sought out and set in order. On such a subject the learned commissioner, of all others, has a right to speak, and to him the highest will listen. A great portion of his life has been laboriously devoted to the construction, improvement, and administration of the bankruptcy and insolvency laws of this country, and to him also both Ireland and India may be said to owe their code. His intellectual capacity and acquirements, his unwearied industry, his resoluteness and integrity of purpose, are too well known to require any comment from us; and his opinions, made public, have peculiar authority, and command the attention of the profession.

The question in dispute arises on the 98th, 99th, and immediately following sections of the 9 & 10 Vict. c. 95—the County Courts Act of 1846—under which judgment creditors may, on judgments recovered in the County Court, and remaining unsatisfied, summon the debtor before the County Court judge of the district in which the debtor dwells or carries on his business, and, on certain grounds specified in section 99, procure his committal to prison. Section 98 provides, that it shall be lawful for any party who has obtained any unsatisfied judgment or order in any Court held by virtue of that act, to summon the debtor, and gives the judge power to examine both debtor and creditor, and all other witnesses he may think requisite, touching his (the debtor's) estate and effects, and the manner and circumstances under which he contracted the debt, or

incurred the damages or liability which is the subject of the action in which judgment has been obtained against him, and as to the means and expectation he then had, and as to the property and means he has, at the time of the application, of discharging the said debt, or damages, or liability, and as to the disposal he may have made of any property. And section 99 furnishes the power and grounds of committal, being in the terms following :—

“ And be it enacted, that if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn or to disclose any of the things aforesaid, or if he shall not make answer touching the same, to the satisfaction of such judge ; or if it shall appear to such judge, either by the examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same ; or shall have made, or caused to be made, any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them ; or if it shall appear to the satisfaction of the judge of the said Court, that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt, or damages, or costs so recovered against him, either altogether, or by any instalment or instalments which the Court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which may be provided as the prison of the Court, for any period not exceeding forty days.”

Thus several grounds of committal are furnished, and the County Court judge enabled, on his own view of the case, without question and without appeal, to commit the debtor, if he refuse or neglect to pay the amount of the judgment, or such part of it as he is ordered to pay, to prison for any period not exceeding forty days; section 103 also providing, that no imprisonment under that act shall in anywise operate as a satisfaction of the debt, or other cause of action for which the judgment was obtained; and that the defendant may on fresh grounds be summoned anew, and imprisoned anew, so long as any part of the judgment debt remains unpaid. So that, except so far as the liability on such judgment is met by the alleviatory laws of bankruptcy and insolvency, all creditors, however numerous, who hold County Court judgments for their demands, may each of them singly, if they can persuade the County Court judge in whose district the defendant is residing or carrying on his business to inflict it, apply this process of imprisonment from time to time, at any time during the period of the debtor's life, unless he satisfies them to the uttermost farthing. And the question in dispute is, whether, where a creditor has obtained such judgment in the County Court, and after such judgment the debtor's case has been heard and adjudicated upon under the Insolvent Act, and a discharge or final order has been obtained protecting him from all process of imprisonment in respect of the judgment debt, all requirements essential to the validity of the adjudication and its application to the particular debt having been complied with, and the creditor, notwithstanding such adjudication, proceeds to apply to the County Court for the imprisonment of the debtor, the County Court judge can *legally*, in defiance of such adjudication and discharge, proved before him on behalf of the debtor at the hearing of the summons, commit and recommit the debtor to prison? And also whether, in the case of bankruptcy—for the question also arises in bankruptcy—the County Court can *legally*, in a similar manner, set at nought the proceedings and adjudication in bankruptcy; and notwithstanding that a certificate of conformity, obtained since the judgment, is put in and proved before him on behalf of the judgment debtor, inflict one or

repeated imprisonments for the amount of the judgment debt, or any part of it which remains unsatisfied.

This paramount power of imprisonment has been claimed by certain of the County Court judges on their construction of the County Courts Act ; and some observations of the Court of Common Pleas, in the case of *Abley v. Dale* (which was an action of trespass by a debtor who had been imprisoned, against the summoning creditor), in favour of the legal existence of such a power, though fraught with a manifest sense of the absurdity of its exercise, and though unnecessary for the determination of the precise point on which *Abley v. Dale* turned, have unfortunately been adopted, both by that Court, and each of the other superior Courts of Common Law, as decisive of the main question, and as establishing the legality of such proceedings by the County Court judges. The power thus asserted has not remained a mere unacted theory, nor been slowly or sparingly exercised : it has, on the contrary, been wielded with all the defensive energy of an assailed and newly-constituted jurisdiction, jealous of its privileges ; and in some instances, as stated elsewhere, the ruin of families, and the untimely death of the " judgment debtor," have been the practical results of the new doctrine of perpetual imprisonment. The injustice and oppression beginning to abound, seem to have rendered it impossible for the man of all others most competent to speak, any longer to remain silent, and Chief Commissioner Law has humanely come forward to vindicate the consistency of the Legislature, and to bring, we hope, effectual succour to the distressed.

The Chief Commissioner begins his " Remarks " as follows :—

" The wisdom of the laws of bankruptcy and insolvency, as they affect the relief given to debtors from the task of paying their debts, is a subject on some branches of which various opinions have been entertained. But there is one principle in those laws, to whose justice and expediency I believe and hope there is a general assent ; namely, that when either of those processes shall have been duly executed between a man and his creditors, there shall be a pronounced period, from and after which his body shall be privileged against molestation on their part."

He then states that the principle of personal protection is in great danger of being practically overthrown ; that County

Courts send men to prison in defiance of it, as if their statute, the "Act of 1846" (i.e., the 9 & 10 Vict. c. 95) warranted them to set at nought that protection. He enters a protest against its being supposed that this violation of an acquired privilege has been sanctioned by the judges of the superior Courts, and treats their difficulty as one rather as to the means of redress, than the existence of a wrong to be redressed; and observes that it will be a subject of regret if those higher powers should, in any case where a man is illegally imprisoned, be incapable of discharging him, or of bringing him before them for inquiry:—

"One should lament, that they who promptly release from the heaviest execution out of their own high courts the man whose body is constrained contrary to an acquired privilege, were impotent to interfere when he is worried by other imprisonments palpably illegal, and the repetitions of which, without such interference, will receive no moral check during the term of his natural life. My purpose is to show, that the law is in fact violated by the practices which I condemn; and to point out the error of supposing that the superior Courts, whether able or not to give redress, have sanctioned the wrong that claims it."

Examples are then given of the wrong itself, and the spirit of it, and "one Whitechapel specimen out of many" cited, which involves the principle that insolvency has the immediate effect of qualifying a man to pay particular debts:—

"A is ordered to pay a debt by instalments, the first to be due on the 20th January. Before the 20th January has arrived, the Law of Insolvency takes from him all title to property, present and future, vesting it in a trustee for creditors. On the 6th of June, Whitechapel, in proceeding to imprison him, has put in writing a reason for doing so. And this is the reason given: 'that on the 20th of January he was of ability to pay, and is so still.' This finding of fact would itself be a curiosity, even if it were not made the pretence of violating the right of personal freedom, which the party had already acquired by final order on the 13th of February."

The fact is then touched upon, that to a very limited extent the "Act of 1846" does qualify the protection obtained through bankruptcy and insolvency; that is, where the order of commitment has been made by the County Court before the protection is acquired. This, in a subsequent part of the "Remarks," is shown to be the effect of the 102nd section, which allows the one

limited imprisonment for the forty days, or other less period specified, to have its course, where it has been actually ordered by the Court before the adjudication in bankruptcy or insolvency, or in other words; before the privilege is acquired; though after adjudication in bankruptcy or insolvency the case is entirely different. The Chief Commissioner approves of this very partial interference with the relief afforded by the bankruptcy and insolvency laws; and it is no more than what was provided by the act relating to judgment summonses, which next preceded and was in *pari materia* with the provisions of the "Act of 1846," and to which we shall, in a subsequent part of this paper, more fully advert. The issue on which the main question may be determined is then thus narrowed:—

"One other topic may here be usefully adverted to, for the sake of clearness. Though the protection through certificate in bankruptcy is precisely in the same danger as protection by a discharge of insolvency, the cases which I have met with concern the latter. All reasoning, however, which concerns one, equally concerns the other. Further, there are two kinds of insolvency in which privilege of the person is to be acquired: one, which I may call the prison insolvency, under the Act 1 & 2 Vict. c. 110; the other, the protection insolvency, under the acts of 1842 and 1844. When the privilege under the protection acts is violated, there is a remedy in a discharge issuing from this Court: not so in the other case. Accordingly, the reported cases to which I shall advert are cases of prison insolvency.

"By the 90th section of the Insolvent Act, it is enacted, that 'No person who shall have become entitled to the benefit of the act shall at any time thereafter be imprisoned by reason of any debt with respect to which he has become so entitled; and that, if he shall be so imprisoned, a judge of the court from which the process has issued, on proof that the debt is such a debt, is required to release him from custody, unless it shall appear that the adjudication was made without due notice given to, or acknowledged or dispensed with by, the plaintiff in the process: and the judge shall have discretion to make the plaintiff pay costs.' Accordingly, on such imprisonment being ordered by a County Court, it is the judge of that same court who is required by this statute to release from the commitment. But he who has just put a man in prison in contempt of his privilege, of course declines to confess his own wrong by letting him out. As to redress *aliunde*, it seems to be doubted whether the forms of law afford it. One instance only has occurred, in which Mr. Justice Coleridge ordered a discharge: it stands alone. The protection is valid in right. The contempt of it is illegal. Nevertheless, whether it be that, on return to a *habeas corpus*, the unlawful warrant will never disclose the circumstances which make it unlawful, or that the

twenty days of a sufferer will have expired before cause can be shown in the following term, or for the reason that, on the committing Court itself devolves the duty of releasing, the fact is, that the injured party is at a loss for redress: as yet, he sees no way to the liberty which is due to him—

“ ‘crudelia retro
Fata vocant.’ ”

Now the Chief Commissioner, besides dealing with the main question, makes a grand effort to rescue the superior Courts from being implicated in any sanction of this assumption of power by the County Courts; we wish he could have completely succeeded in doing so; but while for that purpose he brings to bear upon *Abley v. Dale* some twenty pages or more of acute analysis and forcible criticism, which will well repay the reader; and while we respect the effort, and its motive, and admit that he fully shows that the real premises on which the question must turn had no share in the deliberations of the Court of Common Pleas, and were also overlooked by both the other Courts, yet it is impossible to escape from the fact that an opinion was expressed in *Abley v. Dale* which does sanction the power obtained by the County Courts, as one deliberately entrusted to their discretion by the Legislature, and that the opinion thus given has been adopted as a decision on the point; and, unhappily, even whilst the Chief Commissioner's observations were in the press, the Court of Exchequer, in a case of *George v. Summers*, gave in its adhesion to *Abley v. Dale*, as the Court of Queen's Bench had already done in *Ex parte Christie*.

The marginal note, of *Ex parte Christie*, of which the Chief Commissioner had evidently only a short memorandum before him, is as follows:—“It is no bar to further proceedings on a judgment obtained in a County Court, that the judgment debtor has been discharged by the Insolvent Court, under a petition presented after the date of the judgment; and such judgment may be still enforced by a judgment summons, under the 9 & 10 Vict. c. 95, s. 98.” The application was for a rule to show cause why the imprisoned debtor should not be discharged, or a writ of *habeas corpus* issue; and it appeared that the judgment had been obtained against the debtor in the

County Court for 34 $\frac{1}{2}$ on the 9th of September, 1854; that he had been discharged by the Insolvent Debtors' Court, on a petition of October 31st in the same year; and that after the adjudication by the Insolvent Debtors' Court, viz., in January in the following year, a judgment summons had been obtained in the County Court, and the debtor committed to prison for thirty days. The Court of Queen's Bench refused even a rule *nisi*; and Crompton, J., is reported to have said: "This Court decided, in *Re Boyce*, that a defendant may be committed again and again upon the same judgment, because the non-payment of the debt on each summons is a fresh offence." And per Lord Campbell, C.J.: "We thought that the County Court judge must be presumed to have had before him on each occasion evidence of the ability of the debtor to pay the debt. Under the 9&10 Vict. c. 95, s. 98, the County Court judge is to inquire as to the property of the debtor, and the means that he has of discharging the debt. It may be proved before him that the debtor has the money in his pocket, and can satisfy his debt, and in that case the power to order the debtor to be imprisoned until he honestly pays the debt is a very proper power for him to possess." And, again, per Crompton, J.: "The reason given by the Court of Common Pleas for their judgment in *Abley v. Dale* is the same as that just stated by my lord, and we must consider the decision binding." Lord Campbell also added, that they must consider themselves bound by the decision of the Court of Common Pleas. We may here pause by the way to observe, that some misgivings must have beset the practical mind of Lord Campbell when, in apology for the Legislature having, as supposed, conferred this paramount power of imprisonment on the County Court, he put the case of a debtor, of the description referred to, proved before the County Court to have the money in his pocket at the hearing of the summons. The Chief Justice of the Common Pleas had before said, in *Abley v. Dale*, that to commit a discharged insolvent for non-payment of a particular creditor, and thus to obtain indirectly by imprisonment what could not be had by direct means, was, except under very special circumstances, manifestly unjust, but that cases *might* occur in which the exercise of such a power would be

justified, and that it was not impossible that the Legislature might have supposed that a discretion on that subject might be safely intrusted to gentlemen who were to discharge the important duties of local judges. Thus the idea that there *might* be a case, though a rare one, in which the judge could properly commit, first broached by Lord Chief Justice Jervis, was taken up by Lord Campbell, who, to carry the matter a little farther, with a view of yet more completely extenuating the supposed conduct of Parliament, put the case of the judgment debtor, standing, after the ordeal of insolvency, on a judgment summons before the County Court, and proved to have the money in his pocket. But is it then so clear, that even in the one extreme case thus put forward, to justify the Legislature in conferring such a power on the County Courts, it would be just and proper to commit the discharged insolvent debtor, and thus, by means of imprisonment, enforce payment to the particular summoning creditor? The leading principle of the insolvent laws, says the Chief Commissioner, in a judgment¹ delivered by him, is that, if the debtor gets through the prescribed ordeal, and obtains at last the object of his petition, he is relieved for ever from individual suit; and that all operations against person or property must be on behalf of a trustee for the whole, and under judicial control. And again, in the course of the same judgment, he observes, that the principle of excluding individual suit, at the same time not extinguishing debt, carries with it the wisdom and the justice of leaving the debtor in the secure enjoyment of any present means which the benevolence of others may place at his disposal, means of providing for his own existence, and of laying the foundation of future substance to an amount which the law may call his creditors to share in; and that, if the first ten pounds that he acquires shall, under the discretion of a County Court, exercised under a personal warrant, become the prey of the first greedy creditor, out of many, who presents himself singly as the only ostensible claimant, there will be neither subsistence for the debtor, nor the smallest chance of accumulation for creditors,—he must be a beggar for life.

¹ *Vide Symons' Case*, 3 C. C. Chron. p. 397.

In *George v. Summers*, the application was for a writ of *habeas corpus*, which had previously been refused by the Courts of Queen's Bench and Common Pleas. Judgment had been obtained against the defendant on a plaint in the County Court for 36*l.* 7*s.* 10*d.*, on the 7th of March, 1855, and execution had issued upon it. On the 2nd of April, the defendant was arrested at the suit of another creditor; on the following day petitioned the Insolvent Court, and on the 28th of April received his discharge. The County Court judgment had been inserted in his schedule, and all the requisites of the Insolvent Act complied with, and the County Court judgment creditor had appeared in the Insolvent Court, and opposed the discharge. He, however, on the 10th of May, took out a judgment summons in the County Court; and the County Court judge, notwithstanding the discharge by the Insolvent Court, which was brought before him at the hearing, committed the defendant to prison for forty days.¹ On this application to the Court of Exchequer for relief they, as the other Courts had already done, refused to grant even a rule *nisi*, and expressed their concurrence with *Abley v. Dale*; though Baron Martin felt compelled to state that he thought much might be said on the subject, and that he should hold himself at liberty to reconsider his views if the question came before him in a court of error.

Abley v. Dale was not an application to discharge a prisoner on the ground that he had been improperly and illegally committed by the County Court judge, but an action of trespass against the summoning creditor. Abley had judgment recovered against him by Dale in 1847 in the County Court; he had paid some instalments, but being arrested in May, 1848, he petitioned the Insolvent Court, was opposed by Dale, and discharged by that Court in July, 1848; and in May, 1849, was, on being summoned before the County Court, under section 98, imprisoned under an order of committal made by that Court in the face and in defiance of the adjudication of the Court of Insolvency. The summons taken out by the judgment creditor was regular, the judge was bound to entertain it, to hear the case, and even with

¹ *Vide* C. C. Chron. August 1, 1855, vol. viii. p. 143.

regard to the defence of insolvency not at once to admit it, without proof of the adjudication in insolvency, and its application to the particular debt. The law, therefore, certainly had entrusted the inquiry to the judge, and the summons on the part of the creditor being thus regular, and no more than what the law gave him, he could not be made a trespasser because the judge in the exercise of *his* functions acted improperly and illegally, and, in the face and in defiance of good legal cause shown against such a proceeding, ordered the imprisonment of the debtor. Nor would it make any material difference in the case that the creditor, acting on the order of committal, had procured the warrant to be issued and enforced. Now, in *Abley v. Dale*, it seems in the first instance to have been considered, both by the counsel and the Court, that the commitment was altogether void. The plaintiff obtained the verdict, finding the defendant, the summoning creditor, to have been a trespasser; and Lord Chief Justice Jervis, in delivering the judgment of the Court in *Banco*, said, that one point and one only, had been made for the defendant at the trial, viz. that there was no evidence to show that he had directly or indirectly interfered in obtaining or enforcing the warrant; that the Court was not inclined to interfere with the verdict in that respect; but that a new point had arisen during the argument, which we will here state in his lordship's own words:—

“But, during the argument, Mr. Hugh Hill suggested, for the first time, that, consistently with the evidence, the defendant might have merely left the plaint-note with the clerk, with directions to take the necessary steps; and that all the irregularity might have been the act of the Court, or of the clerk, without the defendant's knowledge or participation. Mr. Lush admitted, that, under such circumstances, the defendant would not be liable in trespass, if the Court had jurisdiction: but he urged that this point, at most, could only entitle the defendant to a new trial; because, if made at the trial, it might have been answered by further evidence. He further contended that the County Court judge had no jurisdiction to commit, after the discharge by the Insolvent Court; and so the defendant would be liable in trespass, and the verdict must stand.”

His lordship then went on to say that the point thus raised was of great importance and much difficulty, and that it depended on the meaning of the word “unsatisfied” in the statute

9 & 10 Vic. c. 95, s. 98, and proceeded at some length to discuss the rule by which judges are guided in their construction of Acts of Parliament, and the meaning of this term "unsatisfied" in section 98; and to hold that as the discharge of the insolvent debtor did not, in any view of the case, of necessity satisfy the judgment, it came within the term "unsatisfied judgment" in the section referred to, and that therefore the County Court, on a judgment summons taken out in respect of it, had jurisdiction to commit. If the observations made in the course of delivering judgment had been confined to the legality of the summons, and the jurisdiction to inquire into the case, no misconception could have arisen; but, unfortunately, they went beyond what was necessary, and recognised and sanctioned the right on the part of the County Court judge to order the commitment, notwithstanding the adjudication in insolvency, as one deliberately intrusted to him by the Legislature, though at the same time Lord Chief Justice Jervis said much as to the injustice in general of any such commitments, and showed that it was not without difficulty and reluctance that the Court had arrived at the construction put upon the statute. We beg to refer our readers to this judgment of the Court of Common Pleas, fully set out and divided into paragraphs, with marginal notes, in the "Remarks," and to the elaborate commentary that follows (only a portion of which we shall presently cite), and ask them to judge for themselves whether the Chief Commissioner has, in his friendly aid to the Court of Common Pleas, done more than show, that in *Abley v. Dale*, they came to a conclusion on a question not properly before them, and without having had their attention drawn to the whole premises on which it rests.

The marginal note on the concluding portion of the judgment, set out in the "Remarks," is as follows: "Apparent conclusion on a point not dealt with." We have already given the passage from the judgment, expressing the idea that there *may* be a case in which the power of committal could be properly exercised, and that it is not impossible that the Legislature may have supposed that a discretion upon this subject might be safely entrusted to gentlemen who were to discharge the important duties of local judges; and the judgment ends as follows:—

"But, without speculating upon the motives of the Legislature, we are not at liberty to depart from the plain meaning of the words used, and therefore are of opinion that the judge had jurisdiction to commit in this case. There ought, therefore, to be a new trial; but it should be on payment of costs, because the point was not made at the trial."

After bringing forward an extract from the "Remarks," having reference to *Abley v. Dale*, we will proceed further with the consideration of the subject, hoping that its great importance will invite the patient attention of our readers:—

"It is seen, then, that the only part of the statute to which the judgment alludes (*i.e.*, the judgment in *Abley v. Dale*), is the 98th section, which authorises a summons when a man does not pay. Now the question I am dealing with concerns, not the summons, but protection and commitment. And there are clauses which materially concern protection and commitment: the 76th, which recognises the certificate in bankruptcy and the discharge in insolvency, as bars to an action; and the 102nd, which puts some restraint on the effect of those protections in procuring 'discharge from commitment.' Of these clauses, neither the judgment of the Court, nor the judges during the argument, take the smallest notice. Thus the right of protection, and the right of disregarding it, were not dealt with.

"On the other hand, the right of summoning was dealt with, perhaps more than enough. The labour was to maintain that an unsatisfied debt was a good ground for a summons under the 98th section: and we are desired to find out the true meaning of the word 'unsatisfied;' to endeavour to put a construction upon the word 'unsatisfied.' It does not appear who ever doubted the meaning of 'unsatisfied,' or what the doubt may be. The 98th clause would be exactly what it is, if the word 'unsatisfied' were not there: the word 'judgment' alone would mean 'unsatisfied judgment.' When our 90th clause prohibits arrest upon or by reason of a judgment, it necessarily speaks of an unsatisfied judgment, and the word 'unsatisfied' is not wanted. In further justification of the summons, we are told more than once that a judgment is not satisfied by the discharge of an insolvent. Surely no man ever thought that it was. It cannot be put in force: but it is not satisfied. I cannot see the necessity for thus labouring to show the legality of the summons. The County Court judge had no knowledge of the protection when he issued the summons; and when the protection was tendered to him, it became his duty to inquire whether this debt was within the scope of the protection. It was admitted on all hands that it was within the scope. Where, then, is the difficulty? Throughout the judgment there is not a word to vindicate the judge, beyond the summoning: all is centered in the 98th section; and the act is made no use of but to vindicate that which needed no vindication. The effect has been most unfortunate: for as the legality of the summons was found

enough for the case in hand, the legality of the commitment was avoided altogether, and the consequence (not certainly a necessary consequence) has been a general misconception of the value of the case.

"Insisting that the legality of the summons is the pith and essence of this case, I would here again call attention to the argumentative portion of the judgment—reasons with something deduced from them. It is this:—'The discharge of an insolvent debtor does not, in any view of the case, of necessity satisfy the judgment or order, and take away the jurisdiction of the County Court in every instance. *Ex concessis*, where a judgment, if it had been in a superior Court, might have been enforced against the person of an insolvent, the judge of a County Court has jurisdiction, under the 98th section of the statute 9 & 10 Vict. c. 95. Instances are mentioned in the 90th section of the Insolvent Act, 1 & 2 Vict. c. 110, in which judgments in the superior Courts may be so enforced. And, as each judgment or order of the County Court may come within this class, the judge of the County Court has jurisdiction to issue his summons to inquire into this matter: and, having jurisdiction,¹ if he make an erroneous order upon that summons, and commit the defendant, the plaintiff will not be responsible in trespass for the mistake of the judge. But, independently of this view of the case, the judgment or order is not satisfied by the discharge of the insolvent. *The person of the debtor is protected*, and the judgment or order cannot be enforced by law upon the debtor's goods: but the debt remains, and may ultimately be satisfied, through the medium of the Insolvent Court, from the present or subsequently acquired property of the debtor.'

"This, the reasoned part of the judgment, may well command our assent. It points out that the judge of the superior Court, when asked to release, may receive proof of the want of notice; and infers that the local judge may do the same. Be it so. It points out that the party is not to be responsible for the erroneous order of the judge. Be it so. It points out that the person of the debtor is protected. This is just what I contend for: only let him be protected in fact, not in theory; and let us not shrink from the consequence that, if protection is his right, the violation of it must be a

¹ "To prevent misapprehension, let me ask—*when enforced?* *Never* against a person who is protected against it. The judge of course is to see that there is a protection, and that the debt is within it: i. e. that the plaintiff was a creditor in the insolvency, and was treated as a creditor. If the debt is within the protection, the judge is *required* to release: he has *no discretion*: he can enforce nothing: and the Court here does not mean to say that he can. The *instances mentioned* are, where a debt is not within the protection; viz. where the plaintiff shows that he never had notice, and has not waived it: accordingly, the debtor has no protection in respect of that debt. This is no exception to the law: it is the law itself. There is no option about notices. Before an insolvent receives a discharge from me, the proof of notices undergoes the most rigid scrutiny: and, if a question shall arise elsewhere, the objector must show a ground: the presumption is that all was done rightily."

wrong. The words 'jurisdiction to commit,' at the bottom of the page, seem to go beyond the doctrine which has just been established, that the plaintiff is not responsible for the erroneous order of the judge; and to contradict the words at the top of the page, 'the person is protected.' If for 'jurisdiction to commit,' we keep to the words in which the question was stated just before, 'jurisdiction to issue his summons to inquire,' the decision will agree with the reasoning which is there to support it: it becomes in its terms what it is in its argument, a decision that the legality of the summons saves the party against the action for trespass."—p. 23.

We will now proceed to set out in detail the statutory provisions, immediately preceding those of the "County Courts Act," or "Act of 1846," in relation to the main question, so that our readers, having those provisions placed before them, may be better able to take a connected view of the whole matter, and form their own opinion upon it.

By section 57 of 7 & 8 Vict. c. 96, "The Act of 1844," it was enacted as follows :—"And whereas it is expedient to limit the present power of arrest upon final process, be it enacted, that from and after the passing of this act, no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior Courts, or in any County Court, Court of Requests, or other inferior Court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment."

Here the primary object of the enactment is expressly stated to be, to limit the power of arrest on final process. It extends to all Courts, superior and inferior; and it limits such power of arrest, by abolishing it altogether on judgments in any action for the recovery of any debt, where the sum recovered does not exceed the sum of 20*l.*, exclusive of costs, subject, however, to the qualification or exception established by a following section, viz. sec. 59, which provides that, in a certain class of cases, although the judgment does not exceed the amount specified in sec. 57, the power of arrest on final process shall, to a modified extent, be still continued; the effect being that, in all ordinary cases, where the debtor is sued, and judgment recovered against him for a sum not exceeding 20*l.*, exclusive of costs, the debtor need not have recourse to proceedings in bankruptcy or insol-

vency to have protection from arrest, but that, in cases attended by circumstances of dishonesty, concealment, or wilful default on the part of the debtor, such as pointed to by sec. 59, he is to have no other mode of obtaining protection, or freedom from arrest, than by submitting to the ordeal of bankruptcy or insolvency, involving, as it does, the entire surrender of all he has, for equal distribution amongst his creditors, the searching investigation into his circumstances and conduct, and censure and punishment by the Court where such is due. Sec. 59, then, of the same act is as follows :—

“ If at any time it shall appear to the judge who shall try such cause, being either a judge of one of the superior Courts, or a barrister or attorney-at-law, that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability, without having at the same time a reasonable assurance of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any personal property, or shall have removed or concealed the same with an intent to defraud his creditors or any of them, it shall be lawful for such judge, if he shall think fit, to order that such defendant may be taken and detained in execution upon such judgment in like manner and for such time as he might have been if this act had not been passed, or for any time not exceeding six calendar months in any case in which the time for which a person taken in execution under process issuing out of any such Court could lawfully be detained in custody, according to the constitution of the said Court, before the passing of this act, is less than six calendar months, whether or not execution against the goods and chattels of such defendant shall have issued as hereinafter provided.”

While, however, sec. 57 of this “ Act of 1844 ” was effectual in the work of abolition of arrest on final process on all judgments to the amount specified, sec. 59 was ineffectual to establish the qualification it sought to engraft upon it, and failed to keep alive the power of arrest on final process in the cases and to the extent it specified. Sec. 59 was thus inoperative for want of machinery to carry out its provisions, the judge to whom the discretion to commit was entrusted having no means given to him for bringing the parties themselves before him, or instituting any other investigation than what was necessary for the trial of the cause. To remedy this state of things, in the following year the act for the better securing the payment of small debts

was passed, "The Act of 1845," which left sec. 57 of the previous act in full operation ; but for the purpose of practically establishing the qualification or exception introduced by sec. 59, gave by sec. 1, to creditors obtaining judgments or orders in respect of debts not exceeding 20*l.*, besides costs of suit, the right of summoning the debtor before the Commissioner of the Court of Bankruptcy in whose district the debtor might reside or be, or before inferior Courts for the recovery of debts, within the jurisdiction of which such debtor might reside or be, and conferred on such Courts the power of examination and committal, in the following terms :—

" And the debtor, appearing before such Commissioner or Court at the time to be appointed in such summons, shall be examined by the said Commissioner or Court, and shall, if the creditor think fit, be interrogated before such Commissioner or Court by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, the property or means of payment he still hath or may have, the disposal he may have made of any property since contracting such debt ; and such creditor shall also, if such Commissioner or Court shall think fit, be examined by the said Commissioner or Court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such Commissioner or Court by the said debtor touching the said claim against him : and it shall be lawful for such Commissioner or Court to make an order on the said debtor for the payment of his debt by instalments or otherwise ; and in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall if attending refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the Commissioner or Court, or shall appear to such Commissioner or Court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the Commissioner or Court shall order, or as the Court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such Commissioner or the judge of such Court to order such debtor to be committed, for any time not exceeding forty days, to the common gaol wherein the debtors under judgment and in the execution of the superior Courts of Justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors'

prison within the same county, city, borough, or place, which shall by any declaration of one of her Majesty's principal Secretaries of State be allowed as a place of imprisonment under this act, so long as such declaration shall remain in force and unrevoked."

By sec. 2, it was in effect provided that the one limited order for imprisonment for the forty days, or a less period, should not be interfered with by the adjudication in bankruptcy or insolvency, where such order had been actually made before such adjudication had taken place, that is to say, before the privilege of protection had been acquired; and by sec. 3, no imprisonment under that act was in anywise to operate as a satisfaction or extinguishment of the debt; and the debtor was to be set at liberty, on payment of the amount due.

These two acts of 1844 and 1845, as to judgment summonses, are in their scope and object identical with the provisions of the "Act of 1846," the County Courts Act, and almost precisely similar in language, no greater variation of phrase occurring than might have been reasonably expected to occur in the process of framing the provisions of the latter act, and of adapting the system of judgment summonses to the reconstituted Small Debts Courts, and to the judgments of these Courts; and no one ever dreamed, until the notion first suggested itself to one or more of the County Court judges, that the Legislature intended to do more than to continue and carry on the system of judgment summonses; or that it was ever for a moment contemplated to give an extraordinary preference to County Court judgments, and powers to County Court judges paramount to all others, and in direct conflict with the laws relating to bankruptcy and insolvency.

The process of commitment under the "Act of 1845," the previous Small Debts Act, has been neatly and appropriately described by Baron Alderson as "a limited *ca. sa.*;" his lordship used that expression in *Ex parte Foulkes* (15 M. & W. 612); and the observations of the judges of the Queen's Bench, in *Ex parte Kinning*, fully bear out this view of the nature of the process. It is not a criminal, but a civil process; and that, too, of a modified character, to enforce payment of a judgment debt; while *Ex parte Dakin* (*Jurist*, 378), is an express decision, to

the same effect on the same process under the County Courts Act, the Court of Common Pleas having in that case ordered the release of a debtor from a commitment of this kind under the County Courts Act, on the ground that he was privileged from arrest as a priest in ordinary of the Chapel Royal at St. James, although the defendant wholly disregarded the summons, and was committed for refusing to appear. There is also the observation by Mr. Justice Erle in *Re Pardy*, included in a portion of the "Remarks" we shall presently cite. But first as to *Ex parte Kinning*, that was a case on the "Act of 1845," on the point whether a warrant of commitment was invalid, for not stating that the defendant had been summoned to show cause against his committal; the decision itself is of course quite wide of the present question, but the nature of the process of commitment was there incidentally noticed.

Lord Denman adopted Baron Alderson's description of the process, viz., "a limited *ca. sa.*" Mr. Justice Patteson said he did not quite like the expression "a limited *ca. sa.*," but he agreed that the process was in the nature of a *ca. sa.*, and was not a process of contempt; and Mr. Justice Erle thus alluded to the origin and character of the process: "It is but a very short time since a man might be taken in execution for a debt of any amount. Then an act was passed which abrogated this sort of execution for debts not exceeding 20*l.*; this state of things was supposed to be too favourable for debtors, and then came this act (*i. e.*, the Small Debts Act, the act of 1845), which is a partial restoration of the old law, with modifications." (10 Q. B. Rep., p. 746.) Notwithstanding this, the notion seems to have still lingered in the minds of some that these commitments are criminal process; and here we will introduce an extract from the "Remarks:"—

"On the notion that these commitments are not process for debt."

"This I know to be a doctrine of those who imprison the protected man. Possibly it may be their chief point. It is one of no difficulty; and it is a point, the only one touching protection, on which a clear opinion has been given in the superior Courts. In *Re Pardy*, 1 Lowndes, Maxwell, and Pollock, p. 16, it was urged that a commitment was bad on the face of it, the warrant not even alleging that there had been a summons; and Mr. Justice Erle said, 'If the

warrant were in the nature of a conviction, it might be bad ; but it is in the nature of a civil execution ; for the defendant may at any time pay the debt and costs, and release himself from the consequences.' In this commitment the causes recited were fraud and non-attendance.

"The idea of these commitments being of a criminal nature was, for want of better argument, alluded to by the defendant's counsel in *Abley v. Dale*. The plaintiff's counsel had stated that the County Courts, in disregarding a man's protection, rely on their 102nd clause ; and he insisted of course that that clause does not invalidate a protection already obtained. The defendant's counsel acquiesced in this by his silence upon it : he only replied, that *commitments under these orders are put upon a different footing from commitments for other contempts in non-payment of money*, thus intimating the doctrine I am alluding to, namely, that these County Court commitments are to be regarded as criminal process.

"If this distinction could be recognised, as proposed, concerning some of the causes of commitment mentioned in these statutes, there would still be the necessity of vindicating the right of protection, and resisting the violation of it. Very few of these commitments proceed on those grounds which it is proposed to call criminal. In all the cases where parties so illegally constrained have come to this Court for their liberation, there is not one where the cause recited has been of that nature. The insolvent subjects of the imprisoning districts are often designated as having 'ability to pay ;' others are sent to prison on the more cautious and less controvertible ground of 'not answering to the satisfaction of the judge.' I have an ample list before me, without one instance, in which the recital concerns property or the contracting of debt.

"But after the case of *Ex parte Dakin* (*Jurist Reports*, 378), there is an end of any such pretence for denying the personal privilege against imprisonment. There the defendant repudiated the jurisdiction to inquire, treated the Court with contempt, by disobeying the summons to attend, and was committed by the County Court of Derbyshire for that disobedience. Yet even this was held process for debt. The Chief Justice says, 'The object of the section appears to me, to enable the plaintiff to get the money by taking the defendant's person ; and I think, therefore, that the commitment is not as a punishment for contempt, but is in the nature of an execution.' Mr. Justice Cresswell says, 'This commitment is to be considered as an imprisonment in execution for a debt. Every case in the 99th section is one of misconduct ; but section 110 explains the character of the imprisonment, namely, for enforcing the payment of the debt, not for punishment.' Mr. Justice Williams says, 'He is in custody under civil process.' Mr. Justice Crowder says, 'The imprisonment must be considered as a qualified execution on civil process.' These opinions are expressed plainly enough. If it had been a case, not of official exemption from the law, but of the right of liberty acquired through a judgment of the law on judicial inquiry, this reason would

have been added to the rest, that the imprisonment was 'by reason of the debt,' that it was prohibited by the 90th section of the Insolvent Act, and that the words 'required to release' leave no discretion to the judge. I need desire no stronger authority than this case. These executions are on civil process, qualified—qualified in that they are only for forty days: qualified also in this—that it may be repeated fifty times without bringing the sufferer nearer to a state of emancipation."

The process, then, being a civil process, a qualified execution to enforce payment of the debt, it is clear, taking the 98th and 99th sections of the County Courts Act by themselves, that the discharge under the Insolvent Act is a good answer to the summons under those sections. But there is another argument, insisted on in favour of the power claimed, derived from another section, the 102nd, of the County Courts Act; an argument not, it would appear, even so much as adverted to by any of the judges of the superior Courts, still less made the ground of their judgment, viz. that the 102nd section expressly exempts the proceedings under the 98th and 99th sections from the operation of any adjudication in bankruptcy or insolvency for the discharge or protection of the debtor. We have already seen that the "Act of 1845" contains a clause, to the effect that if an order of commitment is actually made before the adjudication in bankruptcy or insolvency, *i. e.* before the privilege of protection is acquired, the one limited order for the forty days, or less period, shall not be interfered with. That clause is very distinctly worded; but the 102nd section of the County Courts Act, though manifestly directed to a similar object, is less distinctly worded, and is asserted to be a clause expressly legalising one, or more, or any number of imprisonments, though ordered by the County Court after and in resistance to the adjudication and discharge in bankruptcy or insolvency. The 2nd section of the "Act of 1845," after authorizing the bailiffs and other officers to enforce warrants of commitment under that act, says that no protection, or interim or other order, issuing out of any Court of Bankruptcy, or for the Relief of Insolvent Debtors, nor any certificate obtained "after" such order of commitment, shall be available to any debtor imprisoned under such order. In the 102nd section of the County Courts Act, the act of 1846, the word "after" does not occur; the language of the section, however, still points to

a completed order, an order already made before the adjudication in bankruptcy or insolvency. It says, that whenever any order of commitment *shall have been made*, the warrant shall issue, &c., "and no protection order or certificate, granted by any Court of Bankruptcy, or for the Relief of Insolvent Debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order." It presupposes a valid order of commitment already made. It does not seem to have been considered by the Legislature likely or possible, that when under the very same act the discharge in insolvency and the certificate in bankruptcy were defences as of course to a plaint for any debt to which they applied, they should nevertheless be held by the judges of the same Court, on a construction put by them on this 102nd section, to be no answer at all to a judgment summons on a judgment debt, to which they equally applied; and that the mode of proceeding only being changed, viz. from plaint to judgment summons, there should, without any difference in the merits of the case, or the enactments of the bankruptcy and insolvency laws respecting it, be an entire alteration of the position and privileges of the debtor. Nor again, when, in the year 1847, the 10 & 11 Vict. c. 102, by way of dividing the business as to judgment summons on judgments of the superior Courts, transferred the powers and jurisdiction of the "Act of 1845" (so far as they related to such judgments) to the Court for Relief of Insolvent Debtors, as to debtors within twenty miles of London, and to the County Courts as to debtors elsewhere, does the Legislature seem to have had before it the faintest shadow of a notion that it had already established the extraordinary preference for County Court judgments discovered and asserted by judges of those Courts.

We may here appropriately introduce from the "Remarks" the summary of the statutes, and a portion of the comments on the 102nd section:—

"Now let us understand the statutes. The act of 1844 abolished the *ca. sa.* where the sum recovered did not exceed 20*l.* exclusive of costs; with some exception, if on the trial of the cause certain misconduct on the part of the defendant should be found by the Court. In the following year, 1845, the judgment summons was invented by the Act 8 & 9 Viet. c. 127. The object was to enforce by commit-

ment the payment of debts not exceeding 20*l.*, for which a judgment had been recovered in any Court. These summonses were to be issued by Commissioners of Bankruptcy, and by certain Small Debt Courts then in use all over England, the residence of the defendant being the guide to the jurisdiction.

"In the following year, 1846, the County Courts were established throughout the country, those Small Debt Courts being abolished: and the Courts of Bankruptcy were relieved from the summoning duty, excepting where the judgments were in the superior Courts. In 1847 this jurisdiction also was taken from them; and, in cases where the defendant has resided within a certain distance of London, it was transferred to the Court for Relief of Insolvent Debtors: out of that distance, to the County Courts. Accordingly, at this moment, in regard to a certain space round the metropolis, a judgment summons is obtained from the Insolvent Court, if the debt has been recovered in a superior Court: it is obtained from the County Court, if the debt has been recovered in any County Court. This, however, is to be noticed as to cases round the metropolis: when the Insolvent Court acts, it has to carry into effect the clauses of 1845; when the County Court acts, it has to carry into effect the clauses of 1846; and the two statutes, though the same in spirit, are not the same in words.

"This must also be noticed—when you get beyond the prescribed distance from London which has been alluded to, the County Court issues its summons not only on a judgment recovered in a County Court, but also on the judgment of the superior Court. And here the same distinction must again be observed. In one case the business must be done under the clauses of 1846: in the other case under the clauses of 1845. It is the act of 1846 (c. 98) which gives the County Court its jurisdiction as to judgments obtained 'in any Court, held by virtue of this act, or under any act repealed by this act.' But their power as to judgments of Q. B. &c. comes by means of the Jurisdiction Act of 1847 (10 & 11 Viet. c. 102), which took such duties from the Courts of Bankruptcy, handing them over to the Insolvent Court within a certain defined region, and to County Courts elsewhere. In performing the duties so shifted from the Bankruptcy Courts at that time, County Courts, as well as the Insolvent Court, act under the law which first gave those duties to the Bankruptcy Courts, namely, the clauses of 1845.

"Now, in the act of 1845, no one would ever have thought of raising a doubt on the efficacy of protection. The act assumes its existence, when it enacts a limitation or exception to it. The second clause, which empowers bailiffs to take the body under an order of commitment, provides that 'no protection, or interim or other order, issuing out of any Court of Bankruptcy, or for the Relief of Insolvent Debtors, nor any certificate, obtained after such order for imprisonment under this act, shall be available to any debtor imprisoned under such order as aforesaid.' These words show that the protection of persons acquired through bankruptcy or insolvency is only unavailable, if it has been obtained after the order for imprisonment was made.

"Those who constructed the County Courts Act in the following year, engrafted into it the law of judgment summons which was originated the year before: the 98th and 99th sections of the later act give, but in different words, the matter which was comprised in the first clause of the prior act; the 102nd section gives the matter which was in the second clause of the prior act. There are the same ideas throughout; but the artificer of the last has endeavoured to clothe the ideas in new words. As he was making a law of actions, not merely repeating a law of executions, this was to some extent necessary. But it is plain that, beyond this necessity, he imports his own style of expression. Let me point out a few instances. In the first edition we read, 'it shall be lawful for the creditor so having obtained a judgment'—in the second it is, 'it shall be lawful for any party who has obtained any unsatisfied judgment.' In the first, 'touching the manner and time of his contracting the debt'—in the second, 'touching the manner and circumstances under which he contracted the debt.' In the first, 'available to any debtor imprisoned'—in the second, 'available to discharge any defendant from any commitment.' There is variation in words, not in meaning.

"The question raised by the County Courts is on their 102nd section; which is, as I contend, to the same effect as the 2nd section of the act of 1845, though varied in words. On the County Court ordering a commitment, the clerk is to issue a warrant; the bailiff is to take the body of the person; others are to help him; and the gaoler is to receive him—and no protection order or certificate granted by any Court of Bankruptcy, or for the Relief of Insolvent Debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order.

"Now the County Court argument, in those districts where personal privilege is disregarded, is, that the provision of this clause legalises imprisonment, not only against a protection acquired subsequently to the order of commitment, but against a protection acquired at any prior time. They cannot deny that, where a case arises on the judgment of a superior Court, the protection is good, excepting only where it has been 'obtained after the order for imprisonment:' but, as those words are not repeated in the act of 1846, they say that in a case arising on their own judgment, protection avails not, whatever be the date of it. Perhaps there will be the courage to contend that one clause repeals the other.

"The question made is on the extent to which protection is disallowed by this 102nd clause. As to the principle of protection, it is more affirmatively recognised in the latter act than in the former. This was not necessary, but it happened accidentally. In the machinery of these Courts, pleading is dispensed with: and, as certain special matters of defence must in other Courts be pleaded in bar of an action, it is provided in section 76 that, where such defence is intended, a defendant shall give notice of it beforehand: these matters are—infancy, coverture, Statute of Limitations, discharge in bankruptcy or insolvency. This recognises the principle: if the

defence is proved, of course there will be no judgment to be enforced either against property or person.

"But protection cannot be made available, whether by pleading or otherwise, before it is acquired. Judgment may be obtained against a man in 1850; a bankruptcy or insolvency may take place some time afterwards; and in 1854 he may acquire the protection against all process for his then existing debts. Now suppose that, after these things have happened, the plaintiff of 1850 gets a judgment summons in 1855. The view taken of the subject by certain County Courts is, that the certificate in bankruptcy or discharge in insolvency are unworthy of their notice. They repudiate fact as well as law. They consider that the man can pay all the same, and is to be committed if he does not. He says, very naturally, that he could not pay because the law deprived him of the means of paying. But this answer is not approved of. At Whitechapel it is considered that, in spite of that circumstance, he always had and still has ability to pay. At Clerkenwell the recital is more according to the fact—that the answer is not satisfactory.

"Take this 102nd clause simply on its own words. Lay aside the presumption that it was to have the same effect as the clause of the year before. What is the more obvious meaning? See how the several propositions follow one another. '*Whenever any order of commitment shall have been made, the clerk shall issue a warrant to a bailiff—who shall be empowered to take the body—and all constables, &c. shall aid—and the gaoler shall be bound to receive and keep, &c. until discharged by due course of law—and no protection, order, or certificate, granted by any Court of Bankruptcy or for the Relief of Insolvent Debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order.*' Are we not to understand that all the things here spoken of are things occurring after the order of commitment has been made? When we look to the way in which these sentences follow one another, the plain meaning seems to be that, when once an order of commitment shall have been made, protection which would have been available before shall not be available then: that it will come too late; and shall not have effect to discharge from that commitment."

The Chief Commissioner then proceeds to criticise the mode of expression employed in the composition of the County Courts Act,—a criticism, not in any respect amounting to a censure, but founded on the varieties of verbal expression, that must needs occur when the same subject is treated by different persons,—and asks any man capable of discerning such varieties, just to place the 98th and 99th sections of 1846 alongside of the first section of 1845, and to say whether he does not perceive that the author of 1846 was leaning to his own mode of expression, independently of the alterations required by legal incidents.

He then gives, by way of illustration, a case where the same subject being treated in successive statutes, the same idea has been differently or less amply expressed in one than the other, and the fuller expression of the idea in one place has aided the more meagre expression of it in another. And reverting to the construction he has already, as above set out at length, put on the 102nd section, he farther says:—

“If ever this obvious meaning of the 102nd clause should come to be disputed in Westminster Hall, which it never has been yet, either by judge or counsel, the advocates for committing the protected man will of course display themselves on the *intention* of the Legislature. Now, see the sweeping character of the innovation, the intention of which would be assumed from words so little calculated to suggest it. If a man has, on due inquiry and due notice, obtained, through the process of bankruptcy or insolvency duly worked out, a discharge of person against all existing debts, including of course County Court judgments for 50*l.* or less (his whole list may be made up of these), is it to be credited, unless on the most peremptory and unmistakeable words, that those proceedings are to avail everything to his creditors, nothing to himself?—that at all future time he shall be committed upon summons? If he is to be unprotected, he must be so, even if those creditors opposed his discharge on the hearing some years before; and not only in the case of their opposition having failed, but in the case of its having succeeded. There will have been in this Court, by means of the schedule, and the invitation given to every creditor to come and read it for a fortnight before, the best machinery for trying the debtor's conduct by the test of truth, hearing all parties, and making conclusion on the amplest information. There is no such machinery elsewhere. Yet, if on such inquiry we have adjudged a prompt protection, they say it is to be of no avail; and, if we have withheld protection till after the lapse of a year or two, it is still after that year or two to be of no avail; but the enemy, waiting that period, till his own or other imprisonments are no longer sanctioned here, shall, by appeal to the County Court, begin or revive his course of vengeance. I point to the scope of a construction, which repeals on so broad a scale a settled law, confounds the whole spirit of the insolvency system, and withdraws all resource against the stern severity that existed before 1813.

“These cruel and perverse consequences would result to a man whose state is one of continuing poverty; he may be worried in turn by every party to whom he was indebted; they whose debts had been larger, may have taken judgments for 50*l.* in the knowledge of his poverty; and, as process against the person operates no diminution of the claim, they look now to the chance of screwing out small payments through pressure of the judgment summons. But the torture is not only to him who remains in straitened circumstances. Suppose one visited with prosperity. Then, and then only, by the law of

insolvency, can he be made to pay; and by that law there must be distribution in dividend to all. We ascertain a state of solvency for new debts, and some ability towards the discharge of old ones; and we proceed to the exercise of a just power, whether for a dividend of one shilling or ten. Here, too, will be a provocation to the spirit of judgment summons, if the rage of imprisoning is to prosper. The County Court creditor will receive with complacency the share which belongs to him here. But from this very incident he will know the debtor to be not quite destitute, and will still be stirring for a thirty days' commitment, while there is an unsatisfied shilling to fasten it upon. The recital of recorded commitments are conclusive that he would not be stirring in vain. Such are the monstrous results which some so easily charge on the intention of the Legislature."

Instances are then given of the consequences that necessarily attend the working out of the contradictions that have been allowed to prevail, for which we must refer the reader to the "Remarks" themselves. The cases prior to *Abley v. Dale* are then referred to—*Ex parte Pardy* (1 L. M. & P., p. 16), in which Mr. Justice Erle said he was inclined to think that the discharge by the Insolvent Court freed the defendant from all liability in respect of the County Court judgment; *Still v. Booth* (1 L. M. & P., p. 440), where Mr. Justice Wightman quashed a writ of prohibition issued against a County Court judge, but did so on the ground that he considered the act of imprisonment, not a defect of jurisdiction, but at most an erroneous exercise of power; and the case already adverted to, in which Mr. Justice Coleridge did in fact discharge the prisoner on writ of *habeas corpus*. And from these cases it is collected, that in favour of the validity of protection and the illegality of disregarding it, there is Mr. Justice Wightman, still more plainly Mr. Justice Erle, and most unequivocally Mr. Justice Coleridge.

We now arrive at the end of this discussion, and we do so with the conviction that the Chief Commissioner has established his case, and shown that these commitments are encroachments by which the statute is abused, and men sent to prison contrary to law. Those eminent judges who have, to some extent, though with reluctance and difficulty, sanctioned such proceedings will, we believe, in their desire to be just, have no other feeling than that of gratitude to the Chief Commissioner for having laboriously furnished them with the materials for taking a right

view of the subject, and oppose no bar to its being reconsidered. Something legislative has been said to be in contemplation ; but we would humbly petition for the first prisoner who shall apply on *habeas corpus* for his discharge, that he may have awarded to him the fullest and most patient attention, and most complete investigation of the case in all its bearings ; and legislation, if legislation is necessary, will be more becomingly and efficiently exerted, when the precise extent to which it is necessary has been pronounced, by those whose opinions are entitled to the highest respect, and whose authority all wish to preserve. Nothing has yet occurred that need fetter the opinion, or seal the lips, of any one of the judges. The only true point of *Abley v. Dale* was, that trespass would not lie—all the rest of the case was beside and beyond it ; and the sum of what has followed, both in the Common Pleas and the other superior Courts, is this—that there has been a surrender of the judgment, much to be regretted, to a supposed decision, which was not a decision, but an expression of opinion on a matter not properly before the Court. Baron Martin seems to anticipate more freedom of thought in a Court of Error ; but there is no occasion to resort to error, no need to terrify the poor insolvent with the expense of that Court of ultimate appeal, nor to impale him on the yet unexplained difficulty of how he is to get there. And as to the remedy,¹ supposing these commitments are adjudged to be illegal : if the writ of *habeas corpus*, disclosing on the return the reason of the detainer, and assisted by affidavits, if necessary, to show why the detainer is illegal, will not afford the means of discharging the debtor, and the judges, on the application to them, can point to no other door of escape, then the Legislature must indeed interpose, to provide a remedy for an adjudged wrong, and to give the security of an easy and unconditioned appeal ; that the decisions of County Court judges shall, like those of the superior Courts, be capable of being reversed and altogether set aside, when they are not in accordance with the laws of England.

¹ We beg to draw particular attention to the observations of Chief Justice Jervis in *Dakin's Case*, as to the remedy for illegal detainer, and to those also of Lord Campbell, on the same subject, in *Ex parte Egginton*, 23 L. J., M. C., 41.

We give in conclusion the concluding passage of the "Remarks :"—

"In the important subject to which these pages are addressed, my desire is this—let the questions be grappled with: the questions of the validity of protection, and the right to despise it. They are questions, not between a plaintiff and a defendant in trespass; but between certain local courts and the statute law of England. When those questions shall have been fairly met and decided, we the inferior Courts shall defer to the decrees of the higher judicature: they are the expounders of the law. If, by the imbecility of forms and rules, they are estopped from grappling with such questions, so that the public cannot have the sanction of their interpretation, then indeed it may be fit to enlarge their powers, for controlling the errors of those below them."

J. P.

ART. V.—LORD LYNDHURST: HIS PROFESSIONAL AND PARLIAMENTARY CAREER.

JOHNS SINGLETON COPLEY was born at Boston, in the United States of North America, on the 21st day of May, in the year 1772, and is now, of course, in the eighty-fourth year of his age. His father, a native of that city,¹ married Miss Clarke, daughter of Richard Clarke, Esq.; and by that lady he had issue the subject of this memoir and three daughters. Mr. Copley, a painter by profession, subsequently settled in England, and attained to considerable reputation in his art.²

¹ The family appears to have been originally of Irish extraction; and collateral branches of it are still to be found in that isle. The grandfather of Lord Lyndhurst, who emigrated from the county of Limerick to Boston, in the United States, had married Sarah, the youngest daughter of John Singleton, Esq. This was an ancestor of the Singletons of Quinville Abbey, county Clare, Ireland.

² John Singleton Copley, the father of Lord Lyndhurst, was born at Boston, in North America, in the year 1737. Being self-taught, he was more remarkable for the vigour of his natural genius than for refinement or taste in his art. Connoisseurs allege that his pictures are defective in respect of freedom of drawing and warmth of colouring; and that these faults of his style are more apparent in the productions of his maturer years than in his earlier efforts. His name first became known in England in the year 1760, upon his sending for exhibition, at the Royal Academy,

The education of his son may be regarded as having, about this period, actually and systematically commenced. Having previously passed through a course of careful elementary training, he was entered a student at Trinity College, Cambridge ; and throughout the whole of his academic career, he gave rich promise of the distinction which awaited him in the more extended sphere of public life. In the year 1794, he was announced as Smith's prizeman and second wrangler ; having thus taken a position in his college, which commanded the respect of his teachers and his fellow-students. He had already given striking indications of the vigour of his intellect, as well as the extent and variety of his information, not merely in the higher branches of mathematical learning, but likewise in the fields of classical literature and general knowledge. It has been said—although, perhaps, on no stronger authority than that of the wavering intentions and dubious expressions which not unfrequently divide the thoughts, and are supposed to indicate the tendencies, of a young man at the close of his academic studies, and before the commencement of the actual business of life—that, at this period, the views of Mr. Copley were directed towards the church, as the chosen scene of his future exertions ; and it cannot be doubted that with his masculine understanding, his scholastic attainments, and, above all, with a certain ductility of nature in adapting himself to surrounding circumstances, enhanced as all these advantages were by many attractive personal qualities, he could scarcely have failed to win episcopal honours, and to wear a mitre. He had subsequently, through his connection with the University, an opportunity of gratifying a very early and very natural longing to visit the continent in which his father had been born ; and having, on his return from

a picture of "A Boy and a Tame Squirrel," which attracted much attention. Having visited Italy in 1774, he subsequently settled in England as a portrait-painter. In this branch of his profession he was eminently successful. In the year 1777 he was elected an Associate of the Royal Academy ; and, after the appearance of his celebrated picture, "The Death of Chatham," so well known by the admirable engraving of Bartolozzi, he had the honour of being chosen a Member of the Royal Academy. One of his latest productions was a portrait of Lord Lyndhurst. He died on the 9th of September, 1819, at his residence in George Street, Hanover Square ; leaving behind him a widow, who survived to witness the growing prosperity and honours of her son.

North America, taken the degree of master of arts, he was in due time elected a fellow of his college.¹ While he was thus closely connected with the University of Cambridge, Mr. Copley acquired such tastes, and formed such friendships, as materially contribute to the dignity and happiness of human life,—tastes which have never forsaken him amidst the turmoil of public affairs, and attachments which, originating in a love of literature and science, have been the sources of enjoyment more pure and enduring than the unsteady, fleeting friendships which spring from and expire with the political associations of ambitious men.²

Having been thoroughly initiated into the mysteries of special pleading, Mr. Copley was called to the Bar³ by the Honourable Society of Lincoln's Inn, on the 8th of June, 1804; and a period of self-denying patience awaited him. Without the patronage of the influential classes of the community, and utterly unknown to the subordinate grades of the profession, through which the stream of business flows, Mr. Copley was sustained by his sense of inherent strength, and a conviction that, sooner or later, he could not, according to the common chances of life, fail to have an opportunity of proving that he was willing to labour, and capable of working with practical success; that he would neither be baffled by difficulties, nor easily daunted by opposition. On the Midland Circuit, which, at the time when Mr. Copley was introduced to its bar, was graced by a Romilly and a Perceval, he steadily gained ground; and the credit which he acquired in that scene of his avocations naturally followed him to the metropolis, and gradually opened a path for the young barrister through the crowd of competitors in Westminster Hall. His general business speedily increased; and, in the year 1818, he considered it prudent to assume the

¹ In the Cambridge University Kalendar for the year 1796, the name of Mr. Copley stands the second last on the list of Fellows of Trinity College.

² We find him, even when drawing towards the close of a longer public life than usually falls to the lot of any man, fixing the date of an event by his recollecting that it occurred at the time when he was reading the *Principia*. The companionship of Professor Farish served to develop his natural taste for practical chemistry and mechanics. In both branches of science Lord Lyndhurst bears the reputation of being an adept.

³ *Vide* Whishaw's Synopsis, p. 175.

coif.¹ He was probably induced to take this step for the purpose of securing, to a certain extent, his professional position, inasmuch as he could not reasonably expect any decided countenance from the Government of that day. The course being, in other respects, open to this legal athlete, and the prize being seen glittering at the goal, he forthwith began to throw aside all the incumbrances which might possibly impede him in the race. That a sudden change, about this period, in the political opinions of Mr. Copley displayed itself, and that his professions were in perfect unison with his personal interests, are facts which appear to have been known to many who had access to sources of accurate information ; and, at all events, an allegation to that effect has never ceased to be currently reported, and generally believed. The ultra-liberal tone of his sentiments during the early period of his career cannot, of course, be substantiated by public acts or speeches : the charge rests exclusively on the testimony of intelligent and honourable men, who must have been cognizant of the political views originally entertained by him, and who concealed not their astonishment at the mental revolution which he had rapidly undergone. The foresight of Mr. Copley, and his knowledge of the world, may possibly have guarded him against rash and open avowal of his opinions ; while, at the same time, the conclusions drawn by his companions from sly hints or secret acts may have been certain and strong. Lord Lyndhurst has, no doubt, again and again, resented the charge of political tergiversation which has been so frequently brought against him. But his uneasiness on such occasions has served only to confirm pre-existing suspicions : anxiety to explain is in itself a suggestion that reasons for doubt may have arisen : “ *Tant de soins,*” said J. J. Rousseau, “ *à se justifier produisent quelquefois un préjugé contraire ;*” and the justice of the remark is so obvious, that it scarcely required the sanction of so shrewd an observer of mankind, and of the motives by which individuals are governed. At so early a

¹ On the last day of Trinity Term, 1813, John Singleton Copley, Esq., was called to the degree of the Coif (*Vide* 5 Taunton's Rep. p. 72). On this occasion he gave rings bearing the motto, *Studiis vigilare severis*. No words could have been more appropriately chosen : they were truly descriptive of the course which had been pursued by him.

period as the year 1819, Mr. Copley was taunted with the crime of having relinquished his principles;¹ and the simple truth is, that neither explanation nor denial on his part erased the unfavourable impression from the minds of his political adversaries. This unpleasant topic has not for a moment been allowed to sleep; and the cloud which, in the morning of Lord Lyndhurst's political life, was not bigger than a man's hand, became, year by year, denser and darker, and threw a shade over his otherwise brilliant and long career.²

The talents of Mr. Copley, as an advocate, were of the highest order. Even while behind the bar, and long before he had assumed the coif, he had given tokens of future eminence by a display of intellectual powers, and an aptitude for the conduct of intricate affairs, which justified him in aspiring to distinguished rank in his profession. He was more remarkable, however, for tact, and a certain seductive urbanity, than for extensive legal acquirements, or impassioned oratory. In varied scientific and literary knowledge he surpassed his compeers, and such accomplishments were effectually turned to practical advantage; they served to supply him with apt illustrations, and to add graceful ornament to his clear and simple style. In his

¹ *Vide* the language of the Marquess of Tavistock (H. P. D. vol. xli. pp. 1436, 1437):—"Why," replied the Solicitor-General (Copley), "are such charges as have been hinted at brought against me? I have never, before my entrance into this House, *belonged to any political society*, nor have I in any way been *connected* with politics;" whereupon, Mr. Scarlett, in a strain of courteous irony, remarked: "I have never heard that my honourable and learned friend was a member of any political body. All that can be said, perhaps, is, that my honourable and learned friend *now* entertains opinions different from those which he had formerly expressed respecting his present associates." . . . "The very apprehension of being thought inconsistent may excuse some warmth—a warmth which seems to verify the old proverb, that proselytes are generally enthusiasts."—*Ibid.* p. 1440.

² During the debate, for instance, on the Municipal Corporation Bill (3rd August, 1835, H. P. D. 3rd ser. vol. xxix. p. 1415), he complained of an insinuation thrown out, that he had been "*a Whig, and something more than a Whig*." Lord Lyndhurst instantly challenged the noble Marquess (Lansdowne), who so taunted him, to point out any speech or act which could justify the application of such language to him. *Comp. Law Mag. and Quart. Rev.* vol. xiii. p. 486. On a prior occasion (*vide* H. P. D. 3rd ser. vol. viii. pp. 339, 340), Earl Grey having ventured to remind him that he (Lord Lyndhurst) had, at one period of his life, been favourable to a measure of parliamentary reform, the emphatic reply of the latter was—"Never."

appearances at Nisi Prius especially, he drew copiously from these sources of intellectual wealth. Although a master, too, in the art of mystifying others, no man was more expert in detecting the sophistry of an opponent,¹ or in coquetting with the caution of a cunning or unwilling witness. In the latter department of practice, and its occasional accessory, the discussion of a point of evidence, Mr. Copley was prompt and acute. Never losing sight of the limits within which his privilege of examination was confined, he conducted it with infinite skill; and while the disguises in which, on such occasions, Mr. Scarlett enveloped his design were sometimes transparent, few men could with confidence fathom the sagacity of Mr. Copley, or safely adopt a line of prosecution or defence upon any presumption of the real object which he had in view. Notwithstanding his apparent simplicity and candour, his artifices were all deep and dangerous. As his aim was rather to lead than to drive a witness, the more formidable features of his character were carefully subdued and concealed; and, though conscious of his own power, there was not the slightest approach to arrogant and overweening depreciation of the abilities or attainments of others. He was submissive to the Bench, and courteous to the members of the Bar; in some of whom he willingly recognised more legal learning than he pretended to possess. His style of addressing the Court or a jury was free from affectation of unwonted energy; from all mock-excitement, either of mind or body. His action seldom exceeded the decent manipulation of his brief, or a volume of the "Reports." Every speech delivered by him was, in its structure, clear, logical, and interspersed with references to cases skilfully selected for purposes of illustration. He trusted for success to the strength of human reason—to the effect which might be produced on intellect addressed by intellect. Accord-

¹ There is more descriptive truth than poetical beauty in the following lines:—

"Him lynx-eyed Copley sternly views afar,
Frowns bold defiance and prepares for war;
Measures his rival with undaunted eye,
Like one resolved to conquer or to die.

* * * * *

Crafty and cool, sly Copley shifts his ground,
And turns his strong assailant round and round."

ingly his remarks fell naturally into concise and pointed language. Empty declamation seemed alien to his mind; and the smooth current of his diction was only now and then ruffled by the quick succession of his ideas hurrying him into a corresponding rapidity of utterance. But even during these occasional ebullitions of warmth on behalf of a client, his wondrous power of lucid perception and simple statement was not for a moment obscured, nor did his voice ever lose its pleasing melody. Endowed with such forensic gifts, he could scarcely fail to reduce to the level of the simplest understanding long chains of events and circumstances which might otherwise have perplexed any jury, and, perhaps, even some judges; so that no client, whether victorious or vanquished, could have reason to regret that his rights and interests had not been represented in their most favourable aspect. All doubtful points and perilous suggestions were, at the same time, astutely avoided. By turns candid and sophistical, always plausible and winning, he stole at once upon the mind and the affections: no jury of frank-hearted Englishmen could long resist the stream of limpid eloquence which flowed steadily and strongly on.

It was towards the close of the year 1816, and the commencement of the year 1817, that Mr. Sergeant Copley for the first time attracted public attention; nor was he less indebted to the popular excitement which prevailed throughout the kingdom, than to his own intrinsic merits, for the celebrity which he then acquired, and which has never since forsaken him. William Cobbett and Henry Hunt were at the height of their popularity: all political diseases were to be cured by the nostrums of the one and the operations of the other. The meeting at Spa Fields was held, and the tribunes of the people found it to be more difficult to control than to inflame the passions of the masses of unthinking human beings who had been assembled. The outrages which were perpetrated immediately after the dispersion of the crowd, and the alleged treasonable language which had been uttered, led forthwith to the apprehension and trial of some of the rioters. The conviction of one political dupe¹ followed,

¹ On the 2nd of December, 1816, after the mob had quitted Spa Fields, John Cushman and others entered the shop of Mr. Beckwith, a gunsmith,

while the ringleaders escaped. In connection with these proceedings, James Watson was arraigned for the crime of high treason.¹ His trial, which commenced on the 9th of June, 1817, was not brought to a close until the 16th of the same month. Throughout the whole of that long and intricate investigation, Sergeant Copley, as one of the counsel for the prisoner, displayed his wonted powers, and won fresh laurels. His examination of the witnesses was conducted with admirable skill, and his defence was a masterpiece of reasoning. There are embodied in it, too, some excellent remarks, not only on the law applicable to the crime of treason, but also as to the absolute necessity of having distinct and precise notions respecting the nature of the offence itself, as well as the value of the testimony by which it is sought to be established against an accused party. The observance of such rules is, no doubt, essential to the ends of justice in all cases of judicial procedure, whether civil or criminal; but Mr. Copley proved, by the result of the trial, that his recommendation of a jealous watchfulness to the jury was not an idle elaboration of admitted truisms. He succeeded in convincing those with whose minds alone he was dealing, that the inferences drawn by the counsel for the Crown from the facts given in evidence were all false deductions. "Gentlemen," said he, at the close of his speech, "I have finished: your attention must be fatigued and exhausted. Let me, then, conclude by fervently praying, that that Providence which enlightens the minds of men, and pours the spirit of justice into their hearts, may dispense that light and spirit to you in the discharge of the great duty which is now cast upon you: I feel the utmost confidence in you." It was at such moments of oily phraseology and counterfeit simplicity, that the persuasive powers of Mr. Sergeant

in Skinner-street, and, while violently demanding arms, shot a Mr. Platt, who happened to be in the shop. Cushman, who appears to have been a friendless, penniless seaman, was found guilty, and subsequently executed: Hooper, Gamble, Gannel, and Carpenter, who had been included in the indictment, were acquitted.

¹ *Vide* "State Trials," vol. xxxii. p. 19; and comp. *ibid.* pp. 499, 524, and "The Trial of James Watson for High Treason, by William Brodie Gurney: London, 1817," *passim*. For the Speech of Mr. Copley, *vide* *ibid.* vol. ii. pp. 306, *sqq.* The Attorney-General, after the acquittal of Watson, declined offering evidence against Arthur Thistlewood, John Hooper, and Thomas Preston; and, accordingly, they were discharged.

Copley proved irresistible: flinty hearts felt disposed to melt beneath what appeared to be solar rays, but which were in reality all moonshine:—

“Nor rum-contractors thought his speech too long,
While words like treacle trickled from his tongue.”

The capacity for a discharge of public duties, and, above all, the discretion which Mr. Copley displayed on this important occasion, attracted the favourable notice of the Government of the day.¹ We say emphatically *discretion*; for, during that period of great political excitement, while more ardent men at the Bar, whether acting as counsel for the Crown or for the state prisoners, were wont to unfold their views in unmeasured terms, Mr. Sergeant Copley, having his eyes steadily fixed on future professional and political contingencies, was guarded in his language and wary in his movements. His far-seeing sagacity embraced the entire political horizon. Uncertain of his steps until the dubious light in which he had hitherto walked had become brighter, and his path more defined, he turned his face towards the rising sun, and never did disciple of Zoroaster offer more willing and unwavering homage to the source of warmth and increase. Fortunately for such worshippers, initiation into the mysteries of their faith might, at that period, be conducted much more quietly and comfortably than in these later and more suspicious times, when close boroughs have been thrown open to the glare of day, and Government patronage cannot so easily be purchased by the payment of principle and honour. The borough of Yarmouth, in the Isle of Wight, had long been in high repute as a tractable and comparatively decent nursing-mother to the State.² Gain being her vocation, changelings were her delight. Accordingly, arrangements were

¹ Mr. Copley, unless general rumour be false, first attracted the notice of Government by his argument in the cause of *Thorpe v. Governor of Upper Canada*. He opposed the disclosure of certain official documents. Lord Castlereagh happened, on the occasion, to be present on the Bench. *Vide* Law Mag. and Quart. Rev. vol. ii. p. 475.

² Among her political babes, during the years 1817, 1818, and 1819, is to be found, besides the obscure names of Taylor, Mount, Leslie, and Montgomery, that of Mr. Foster, King's Advocate-General for Ireland. *Vide* British Imperial Calendar, for the year 1817; ditto, for 1818: comp. the Royal Kalendar, for the years 1817, 1819.

made¹ for the return of Mr. Copley as representative of that borough in the House of Commons ;² and, gradually adapting himself to his new sphere of action, he ere long displayed knowledge so varied, and powers of debate so rare, as gave promise that he could not fail to prove a most efficient adherent of the Ministry. On the 19th of May, 1818, he delivered the speech which has generally been regarded as his maiden one—in the restrictive sense, of course, which can alone be applicable to a barrister who had been, during many years, talking every day boldly and fluently in the supreme courts of judicature.

He must have felt perfect confidence in his own powers ; for he ventured to throw down the gauntlet to Sir Samuel Romilly, who was at that time in the very zenith of his well-earned reputation and vast political influence. The subject was the Alien Bill ;³ the adoption of which by the House of Commons he vindicated, inasmuch as it was neither an infringement of the domestic policy of the country, nor could be considered a violation of ancient constitutional principles. He conceived the measure to be, at that crisis, necessary, as a check upon the influx of foreigners deeply compromised with other European governments, and whose minds were tainted with extreme anti-monarchical dogmas. He protested against the introduction of such an amount of combustible matter into England. This topic was frequently discussed in Parliament ; and Mr. Copley uniformly maintained the doctrine, that a power to send foreigners out of the kingdom resides in the Crown, and is a branch of the prerogative which, besides being recognised by civilians of high authority, such as Vattel and Puffendorf, has

¹ By the resignation of Alexander Maconochie, Esq., a Scottish advocate. Although Mr. Maconochie had little influence beyond that which was inseparable from his official position in the House of Commons, he was, nevertheless, a shrewd man. He discharged the duties of Lord-Advocate for Scotland with energy ; and, after his elevation to the Bench (he sat in the Court of Session as Lord Meadowbank), he maintained a higher reputation than some lawyers had anticipated. His natural quickness of parts found the most favourable field for its display in the trial of criminal cases. None of his colleagues excelled him in this department of his judicial duties.

² He was returned as member of Parliament for Yarmouth on the 28th of March, 1818.

³ *Vide* H. P. D. vol. xxxviii. pp. 820-824. The object of the bill was nothing more than to regulate a power which the Crown already possessed.

been sanctioned by the practice of two centuries.¹ The apprehensions entertained were not, at that time, altogether visionary. The measures proposed, from time to time, by the Government of the day, with a view to its having some control over the stream of foreigners which was pouring into this country, and permeating every county, were neither unnecessary nor inexpedient. The spirit of national hostility engendered by a long and sanguinary war had not completely subsided, and various European dynasties were still in a precarious and unsettled state. Nor were the provisions of the Act in question wantonly or capriciously carried into effect. As repose became more general, this jealous watchfulness was practically relaxed; until, at last, the soil of England is hailed as a resting-place, and her law as a shelter, by thousands who have been driven into exile, only because their souls have yearned for that liberty which she, ages ago, won, and who are daily learning to admire her free institutions, and bless her generous hospitality. In his speech on the Alien Bill, Mr. Copley displayed much accurate historical information; and every sentence of it was remarkable for those first elements of all excellence in written or spoken discussion—precision of thought and perspicuity of style.

The efficient parliamentary support which he had uniformly given to the Minister was speedily acknowledged; and the favours² bestowed upon Mr. Sergeant Copley by Government, towards the close of the year 1818, were only an earnest of those higher offices to which he was now rapidly climbing. He relaxed not his efforts: he knew that politicians are generally remunerated according to their zeal by the leaders to whom they look for patronage, and he therefore guarded the position which he occupied. Although too prudent to make frequent demands upon the patience of the House of Commons, he never allowed so long an interval to elapse in silence as might tempt a rival to supersede him, or lead the Minister to suspect him of indifference concerning the stability of the Cabinet, or the vindication of its measures.

¹ *Vide* H. P. D. (N.S.) vol. i. pp. 787-790.

² "In Hilary Term, 1818, Mr. Sergeant Copley was appointed to the office of Chief Justice of Chester, in the room of Mr. Sergeant Best, and, together with Mr. Sergeant Pell, was made King's Sergeant."—J. B. Moore's Rep. vol. iii. p. 2.

In the mean time, his professional success kept pace with his political advancement. By his services in Parliament he had become useful, almost necessary, to the Government. It had been found convenient, no doubt, that he should be withdrawn from the borough of Yarmouth and transferred to that of Ashburton;¹ but this change proved no obstacle to his progress.

Fortune was propitious; and, as the certain and sweetest antidote to the enmities which too frequently haunt the walks of public life is to be found amidst the repose and pure enjoyments of the domestic circle, Mr. Copley consulted his personal comfort by marrying a lady remarkable for her beauty and accomplishments, "a bright particular star" in the galaxy of fashion.²

From this period he ascended, step by step, the ladder of the State, until he reached its summit. During the long vacation of the year 1819, Sir Robert Gifford having been appointed Attorney-General, Mr. Sergeant Copley, in the month of July of that year, succeeded to the office of Solicitor-General, and subsequently received the honour of knighthood.³

A new epoch now commenced in the life of this remarkable man, who boldly pursued the path which he had prescribed for himself as an adviser of the Crown.⁴ The body politic was at that period in an extremely unhealthy condition; and the plague-

¹ Mr. Sergeant Copley was, in the month of June, 1818, returned as one of the members for Ashburton, in the county of Devon; which borough he continued to represent down to the year 1826. *Vide Gazette* (20th February, 1819).

² He married Sarah-Geary, daughter of Charles Brunsdell, Esq. This lady was, at the period of her marriage to Mr. Copley, the widow of Colonel Charles Thomas, of the 1st Foot Guards, who fell at Waterloo. Three daughters were the issue of this marriage. The lady died on the 15th of January, 1834.

It may be as well to mention here, though by way of anticipation, that Lord Lyndhurst contracted a second marriage on the 5th of August, 1837, with Georgiana, daughter of Louis Goldsmith, Esq.; by whom he has a daughter, Georgiana Susan.

³ *Vide Barn. and Cress. Rep.* vol. iii. p. 538; and *Gazette* for 20th August, 1819.

⁴ We refer to the long and spirited debate which took place (24th and 25th of November, 1819) on the Address suggested by the Prince Regent's Speech at the opening of the session. One special theme of remark was, the collision which had occurred in Manchester between the military and masses of the people. *Vide H. P. D.* vol. xli. p. 166.

spots were, during several succeeding years, gradually becoming more visible and alarming. Throughout the north of England and the west of Scotland, tumultuary assemblages of the idle and the discontented had thrown entire communities into a state of trepidation. The mind of the industrious artizan was withdrawn from his peaceful avocations to be fed with tales of visionary bliss; and the seeds of mutual distrust were sown within the precincts of social and domestic life. Many temporary Acts of Parliament had, from time to time, been passed with a view to meet such emergencies; but these occasional restraints had proved ineffectual. Each successive period of their operation having expired, the spirit of mischief awoke, and strode through the streets of large towns and extensive districts in renovated strength and with more repulsive aspect. No sooner was the pressure removed than the flame burst forth with intenser violence. It was considered absolutely necessary, therefore, to introduce into Parliament a measure which might be permanently effectual as a check upon seditious meetings. On this occasion the Solicitor-General was unexpectedly called upon to unfold the details of the plan submitted to the consideration of the House of Commons;¹ and, as might have been expected from his clear apprehension of minute facts, his habit of arrangement, and aptitude for extemporaneous exposition of points which to less severely trained minds must have appeared intricate in themselves and unconnected with each other, so well did he execute the task which had devolved upon him, that no one who heard him could possibly misapprehend the nature of the proposed measure, the views in which it had originated, and the public benefits which it was hoped it might confer.

On all occasions, indeed, at the Bar as well as in the Senate, he continued to give proofs of great capacity and growing experience.

¹ In these remarks we allude to the Speech of Sir John Copley on the second reading (2nd December, 1819) of the "Seditious Meetings Prevention Bill," upon its being moved by Lord Castlereagh. In proof of the great command which he had over his reasoning faculties, we may mention that he, to please Mr. Brougham, adopted a line of argument, or rather, a method of statement, which the latter had suggested. *Vide* H. P. D. vol. xli. p. 596.

In conducting the trial of the Cato-street conspirators, for instance, he displayed wonderful energy and skill. Throughout the whole of that remarkable occasion, which occupied the attention of the Court during a period of ten successive days,¹ the Solicitor-General kept the long chain of evidence clearly in view : not a single link was allowed to drop ; and many of the questions put by him on cross-examination to the witnesses for the defence had reference to remote objects, and minute though important incidents, which probably neither witness nor jury conceived to be material, until the obscurity was dispelled by his luminous reply. The same high forensic accomplishments shone pre-eminently throughout another trial² in which he was officially called upon to play a prominent part, and to which, whether we reflect upon the spirit in which the prosecution originated, or the details with which it was connected, honourable minds of all parties, we suspect, now look back with pity and regret. His "Reply," on the trial to which we refer, was succinct, perspicuous, and conclusive, while, at the same time, it was calm and dignified.³ Nor were his services to the Crown confined to his exertions as an advocate. In the House of Commons he maintained his position, and defied unpopularity. Endowed with far higher intellectual powers than his amiable colleague, the Attorney-General, he voluntarily marched, or

¹ The trial of Arthur Thistlewood and others lasted from the 17th to the 28th of April, 1820. The Solicitor-General opened the case against James Ings with perfect fairness, as well as simplicity and precision. His reply was conclusive ; and a conviction, as every one knows, followed. *Vide* "State Trials," vol. xxxiii. p. 711 ; and for the Reply of the Solicitor-General in the case of John Thomas Brunt, *vide* *ibid.* p. 1293. Compare, *passim*, "The Trial of Arthur Thistlewood," by William Brodie Gurney : Lond. 1820.

² We allude to the trial of Queen Caroline, which commenced on the 17th of August, 1820, before the Peers, in their legislative and judicial capacity. The Solicitor-General distinguished himself in the discussion of preliminary and incidental points, as well as throughout the conduct of the cause. His review and summing up of the evidence (28th October, 1820) was, even after all the fatigue, mental and corporeal, which he had undergone, admirable.

³ *Vide* a pamphlet intitled "Pains and Penalties ; Summing up of the Attorney-General and Solicitor-General : " 8vo. Lond. 1820 ; and Gurney's "Trial of Queen Caroline : " 8vo. Lond. 1821. Compare with these "The Speeches of his Majesty's Attorney and Solicitor-General, before the House of Lords, on the 27th of October, 1820, and the two successive days, in reply to the defence of Queen Caroline : " 8vo. Lond. 1820.

was prudently ordered to the van on all ministerial emergencies. Alleged grievances, real or imaginary, were reserved for his official scrutiny: wrongs supposed to have been perpetrated by judges¹ or magistrates,² as well as those suspected to have been endured by prisoners,³ were all, in their turn, examined and disposed of by Sir John Copley. On questions involving constitutional principles,⁴ his views were always enlightened and generally sound; and any measures proposed for the regulation or improvement of particular branches of the law were, upon the whole, fairly discussed by him.⁵ He could not, however, shake off his professional trammels; and scanty was the assistance which he afforded to Mr. Brougham, whose practical patriotism hailed, while it hastened, the dawn of that day of Law Reform which has since become brighter, and which is destined ere long, we trust, to reach its meridian.

Upon the elevation of Sir Robert Gifford to the Mastership of the Rolls, Sir John Copley was appointed Attorney-General;⁶ and, during his comparatively brief tenure of that office, he discharged the duties of his station with spirit and precision. In the House of Commons his intelligence and shrewdness were always at command for the shaping or maturing of measures, even though these happened to be of no great public importance;⁷ and he occasionally evinced more expertness in reconciling

¹ Take, for instance, his vindication of Mr. Justice Bushe (23rd February, 1821), and his condemnation of certain resolutions in which the conduct of Chief Baron O'Grady was impugned (17th July, 1823).

² On the occasion of Mr. Denman presenting a petition (27th July, 1824) from Charles Flint, complaining of the conduct of Mr. Chetwynd, a magistrate of the county of Stafford, while acting as chairman of the Court of Quarter Sessions.

³ *Vide* H. P. D. vol. ix. p. 1076; comp. *ibid.*, N. S., vol. vi. pp. 152, 518.

⁴ *Vide* his defence of the Constitutional Association (H. P. D., N. S., vol. v. pp. 1051, 1052; comp. *ibid.* p. 1498; and *ibid.* vol. vi. p. 1313) against the attacks of Mr. Whitbread, and the opinion of Mr. Scarlett, who considered the association illegal.

⁵ We say, *upon the whole*; for there was apparently a want of earnestness on his part. *Vide* his defence of Sir Thomas Plumer (M.R.), and the Lord Chancellor of Ireland (5th June, 1823).

⁶ In the course of Michaelmas Term, 1824. *Vide* Barn. and Cress. Rep. vol. ii. p. 538.

⁷ *Vide* his observations relative to certain alterations which had been introduced by the Duke of Athol into the criminal jurisdiction of the Isle of Man.

angry disputants, and soothing temporary irritation,¹ than gentleness in avoiding strife or self-restraint in quelling the rebellious spirit which sometimes stirred within his own breast. His horror of innovation, however, was, even in matters strictly professional, carried to excess; and we can discover, in the early period of his parliamentary career, the same inveterate adherence to ancient custom, and the same distrust of proposed alterations in the forms of civil or criminal procedure, which have rendered all his steps towards Law Reform so slow and uncertain. He resisted, for example, the concession of the privilege of being defended by counsel to prisoners accused of felony,² while he affected horror at "the waging of a war of wit, ingenuity, and eloquence in the temple of justice." Within no other edifice can so sacred a contest be with more propriety carried on, and by no other weapons can victory so glorious be won. It is the very arena in which Lord Lyndhurst himself first wore the civic crown.

On the 12th of July, 1826, Parliament was prorogued to the 24th day of August of that year. In the meantime,³ Sir John Copley was elected one of the representatives of the University of Cambridge, his colleague being Viscount Palmerston. He had in his academic and professional career reflected the highest credit on his *alma mater*, and now she, in her turn, hailed her influential son, not, probably, without a hope that he might, through his position in life, enhance her charms, or, at all events, would with filial piety veil any blemishes which time had impressed upon her venerable form; and the intimacy thus revived was strongly cemented by his speedy appointment to the Mastership of the Rolls⁴—a high judicial office, which invested him with considerable ecclesiastical patronage. No profound knowledge of the abstruser doctrines connected with the law of real property was expected from him as an equity

¹ *Vide* H. P. D. vol. x. pp. 597-599, for a specimen of his tact in this respect.

² H. P. D., N. S., vol. xi. p. 205, *sqq.*; comp. vol. xv. p. 596, *sqq.* (26th April, 1826).

³ 20th July, 1826. *Vide London Gazette* for the 25th July, 1826.

⁴ "The King has been pleased to direct letters-patent to be passed under the Great Seal of the United Kingdom of Great Britain and Ireland, constituting and appointing Sir John Singleton Copley, Knight, Master and Keeper of the Rolls and Records of the Court of Chancery, in the room of the Right Hon. Lord Robert Gifford, deceased."—*Lond. Gazette*, 15th Sept. 1826.

judge;¹ and, fortunately for his reputation, Sir Robert Gifford having like himself been trained to the practice of the Common Law, no invidious contrast could be instituted between his predecessor and himself. The balance, indeed, was, in respect of natural grasp of intellect, in favour of Sir John Copley. But, without entering into the merits of the question, which has since that period been discussed, as to the expediency of continuing the anomaly of a judge of the land having a seat in the House of Commons, we may remark that it might have been well, so far as the political consistency of Lord Lyndhurst is concerned, if at that crisis he had been excluded from Parliament, inasmuch as it was on the 6th of March, 1827, that he delivered his memorable speech² *against* Catholic Emancipation—a speech remarkable for the historical knowledge on which his various propositions rested, and the closeness of argument by which these were enforced. Dissensions in the Cabinet, on the Catholic question, however, were daily becoming more open and more serious. It is not our intention to enter into the details of the negotiations which ensued between the Duke of Wellington and Mr. Canning. It is sufficient for us to state that, when both Houses of Parliament met, on the 2nd of May, 1827, the subject of this memoir arrived in state as Lord Chancellor Lyndhurst; and, having been introduced by Lords King and Howard de Walden, took the oaths and his seat among the peers of England.³

¹ *Vide* "Reports of Cases argued and determined in the High Court of Chancery, during the time of Lord Eldon, by James Russell, Esq., Barrister-at-Law." The second volume of these valuable reports comprises the periods in the years 1826 and 1827, respectively, during which Sir John Copley sat as Master of the Rolls.

² *Vide* H. P. D., N. S., vol. xvi. pp. 906, *sqq.*; and compare his observations (18th February, 1825; H. P. D., N. S., vol. xii. p. 519) on the conduct pursued by the Catholic Association as to criminal prosecutions—conduct which he reprobated as being a direct interference with the due administration of justice.

³ On the 12th of April, 1827, the Earl of Eldon tendered his resignation of the Great Seal; but he continued, for some days, to sit in the private room adjoining Lincoln's-Inn Hall. On the 20th of April, Sir John Copley, Master of the Rolls, was created Baron Lyndhurst, of Lyndhurst, in the county of Hants; and, on the 30th of April, the Great Seal was delivered to him (*Vide* 2 Russell's Rep. p. 633). His decisions are to be found in Mr. Russell's Reports. At page 184 of vol. iii., he appears as Chancellor on the 16th of April, 1828. *Vide* *ibid.* p. 286. Vol. iv. comprises exclusively decisions of Lord Lyndhurst. His arms are: Argent in a cross patence sa.; within a bordure, az. charged with eight escallops of the field. Crest: A

In the meantime, the Ministry had resolved upon ceding to the Catholics their long-contested claims ; and as these were, not less than our own, the days of "table-turning," the Duke of Wellington and Sir Robert Peel, under the influence, perhaps, of some mental impulse, akin to that mysterious principle of action which Dr. Carpenter, or any other adept in the occult science, would have called the "ideo-motor-power," had consented to abnegate the principles upon which they had, down to that period, uniformly acted.¹ They had, of course, plausible apologies for this defection : *totius autem injustitiæ nulla capitalior est quam eorum qui, quum maxime fallant, id agunt ut viri boni esse videantur* ;² and yet Sir Robert Peel, by the forfeiture of public confidence and the alienation of private friends, alone paid the price of it. The Duke of Wellington possessed other high and paramount claims upon the gratitude of the country. Lord Lyndhurst, strange to say, outlived politically the shock, and continued to hold a high position in the House of Lords. Lord Bacon, who on more than one occasion tested the truth of his own aphorisms, hints at the wisdom of adhering so moderately to any set of principles, that a man "may be thought of one party and not be odious to the other," and recommends the counsel as being "the best way of preferment ;" "for," adds he, "the traitor in faction commonly goes away with the prize." That section of the Tory party which dismissed from its Pantheon the greatest of England's commoners, continued to burn incense before the image of its idol-peer. The minds of the Scottish covenanters were, towards the close of the seventeenth century, sadly perplexed on the subject of what they called "right-hand and left-hand extremes," and Lord Lyndhurst took alternately both directions ; while, at the same time,

dexter arm embowed in armour proper, charged with an escallop or, encircled about the wrist by a wreath of laurel, vert, holding in the gauntlet a dagger proper, hilt and pommel gold. Supporter : two eagles proper collared, or, pendant therefrom an escutcheon arg. charged with a cross as in the arms. Motto : *Ultra pergere*.

¹ *Vide* H. P. D., N. S., vol. xx. p. 386 ; and comp. *ibid.* p. 1025. The breach between the Earl of Eldon and Lord Lyndhurst was, at this period, rapidly widening. The former would no longer allow himself to be addressed as the *friend* of Lord Lyndhurst.—*Vide* H. P. D., N. S., vol. xxi. p. 190 (3rd April, 1829).

² Cic. de Offic. lib. i. cap. 13.

his lines of policy ran parallel to one another, and the points in which they terminated were all respectively centres of self-interest. The change was perhaps, after all, nothing more than a convenient recognition of the more liberal views of his early years; so that he might have availed himself of the witticism of Buck, the York comedian, who, when asked with reference to his politics, how he came to turn his coat *twice*, coolly replied, "One *good turn*, to be sure, deserves another." Lord Lyndhurst had been distinguished by his earnest and eloquent refutation of all the pleas for concession, and all these prior refutations he now gravely undertook to refute¹—

"Viribus ille
Confusus periit admirandisque lacertis."

But *nihil est omni parte beatum*: within the sphere of ambition severe probation has not unfrequently to be encountered; and accordingly the path of Lord Lyndhurst has not always been strewn with flowers. The briars on which his roses grew were constantly piercing him to the quick. A public man must, in England, to be popular, be true to those principles and that cause through the prevalence and success of which he owes the social position and official influence which enable him to be, at will, a blessing or a curse to the commonwealth. If this be not admitted as a general principle, we know not how there can be permanent union or energetic action among the members of any political body: without matured, consistent theory and practice, no beneficial end can be accomplished, no pernicious system can be strenuously and successfully opposed; nor can statesmen otherwise have claim upon the confidence of the people. Now, with all our unfeigned admiration of Lord Lyndhurst, we cannot conceal the fact, that through the whole course

¹ On the 10th of June, 1828, Lord Lyndhurst said, in the House of Lords: "In my opinion, and exercising the best judgment I can on the subject of their (the Catholics') demands, I do not think that making the concession demanded will have the effect of composing or tranquillising Ireland." On the 3rd of April, 1829, he said: "They (the Ministers, in proposing the Relief Bill) had adopted a course which would lead to the termination of those mischiefs, and give to the people of Ireland tranquillity and prosperity." Even as to the legal opinion which Lord Lyndhurst gave in the course of the debate in the year 1829, he had ten months before (10th of June, 1828) given his legal opinion on the same topic to a diametrically opposite effect. *Vide* Annual Register, vol. lxxi. pp. 76-78, notes.

of his life there is visible, as Junius remarked of the Duke of Grafton's, "a strange endeavour to unite contradictions." The son of Oceanus and Tethys, says the fable of ancient mythology, having received from Neptune the gift of prophecy, was wont, while reposing on the shore, to be consulted by mortals anxious about futurity; but, difficult of access, he would refuse the boon, and by assuming various shapes elude the suppliant. Lord Lyndhurst, we regret to say, appears to have been considered the political Proteus of that era; and, amidst the general excitement which prevailed throughout the country at the period of the enactment of the Catholic Relief Bill, he was exposed to much acrimonious abuse,¹ which he had, beyond all doubt, voluntarily by his words and acts provoked. The Reverend Rowland Hill, having been told that it was expected he should take notice of some unhandsome things which had been publicly said of him, calmly declined to enter into any vindication of himself: "I have now," remarked he, "lived a great many years in the world, and, having passed through much of evil report and good report, I have arrived at this conclusion—that no man can possibly do me any harm except myself;" and the accomplished ex-chancellor might have safely adopted that language. The unkindest cut of all was inflicted at so recent a period as the 19th of June, 1849, in the House of Lords. On that occasion Lord Lyndhurst had, in extreme old age, been stating, with his usual unrivalled calmness and perspicuity, his views concerning the Canadian rebellion and the measures which had been adopted towards that colony, when Lord Campbell rose, and with some acerbity reminded his fellow-peer of the early opinions attributed to him, and sarcastically congratulated him upon his return to what Lord Campbell chose to call the "cause of Liberalism;" nay, he was proceeding to lecture Lord Lyndhurst concerning his conduct with reference to the Catholic question, when he was, amidst a storm of voices, called to order. We have a perfect appreciation of Lord Campbell's high character and attainments; but we cannot approve of the spirit in which his remarks were on that occasion conceived, and still less of his political prudence in attacking, without having received the

¹ *Vide the Age newspaper* (5th April, 1829; 21st June, 1829; 21st June, 1828).

slightest provocation—for the observations of Lord Lyndhurst on the relative positions and duties of a mother-country and her colonies were at once apposite and temperate—the venerable peer on a field where the latter was surrounded by so many friends and admirers, and on which he had won so many victories.

The Whigs remembered Lord Lyndhurst as a hopeful plant which had become tainted in the bud and faded: the extreme Protestant Tories flung him aside as having been developed into the flower of political apostacy. Of the two bands of foes, the latter, as having been the more recently compromised, was the more fierce; and in its ranks were to be found a few irregular mercenaries, who ruthlessly carried their hostilities beyond the limits of legitimate warfare. Other causes of uneasiness were more secretly, though not less effectually, disturbing the equanimity with which he is by nature in no ordinary degree blessed; and these, having been topics of public discussion, were so fully unfolded, that they may without impropriety be introduced into a sketch which purports to be a faithful delineation of the more striking features of his lordship's professional and political character. We have no desire, however,

“spargere voces
In vulgum ambiguas:”

we would not revive in detail all the vague suspicions and uncharitable surmises connected with the prosecution of the *Morning Journal*; and still less have we any intention to perplex the reader with the technicalities of that action or the forms which the proceedings assumed. It would be absurd, however, to smother all allusion to the affair: it is a little episode in our legal epic, and serves to illustrate the unpopularity into which the hero had fallen with a certain portion of the public press, as well as the virulent spirit in which the Lord Chancellor was then persecuted. The charge against Lord Lyndhurst was, in substance, neither more nor less than that of corruption in the distribution of his political patronage; the gist of the libel being, that he had accepted the loan of a large sum¹ of money from Mr. Sugden (now Lord St. Leonards), on the understanding that the latter was to be promoted to the

¹ The sum alleged to have been borrowed was no less than 30,000*l*.

office of Solicitor-General.¹ Mr. Sergeant Wilde (now Lord Truro) showed cause² against the rule, which called upon several persons to show cause why a *criminal information* should not be filed against them for the publication of a libel against the Lord Chancellor; and he was followed on the same side by Mr. Pollock (now Chief Baron). The offensive passage appeared in the form of an imaginary conversation, in the style of Sterne, between Uncle Toby and Corporal Trim. Mr. Denman was counsel for the defendants. The Attorney-General (Scarlett) vindicated the course of procedure which the Lord Chancellor had adopted; and, after some remarks from Lord Tenterden, the rule was, upon the strength of affidavits, made absolute. The trial of the cause,³ which subsequently took place before a special jury, excited great interest throughout the profession and the public; the result being, that all the defendants were found guilty.

Lord Lyndhurst, as a member of the Upper House, applied himself to the devising of measures for the despatch of business; and during the two years which intervened between his accession to office and his retirement from it along with his political friends, in the year 1830, he introduced some plans for a reform of the Court of Chancery.⁴

¹ The office of Solicitor-General is in the gift of the Crown by advice of the Council, of which the Lord Chancellor is a leading member. This piece of patronage, therefore, although nominally in the Crown, has always been exercised on the recommendation of the Lord Chancellor.

² *Vide the Times* for 30th June, 1829; the *King v. John Fisher* and others.

³ *Rex v. Gutch, Fisher, and Alexander. Vide Moody and Malk. Rep. p. 433.* The present Chief Baron conducted the defence with great ability. Comp. the *Times* for 23rd December, 1829. The defendant, Gutch, was in Hilary Term following discharged on his own recognizances. The late Chief Justice Tindall was, on the trial, examined to prove that the paragraph in question had been understood, when read by him, to apply to the Lord Chancellor: Lord Bexley and the Master of the Rolls gave testimony to the same effect, viz., that the impression left upon their minds was, that, in consequence of a loan of 30,000*l.*, the Lord Chancellor had been induced to recommend Mr. Sugden to the office of Solicitor-General. We may mention that the libel appeared in the *Morning Journal* for the 30th of May, 1829. The defendant Alexander, the editor, made an extremely spirited defence.

⁴ *Vide H. P. D., N. S., 7th March, 1827; comp. ibid. vol. xxiii. p. 298, 15th March, 1830.* On the 12th of May, 1829, he moved the second reading of a Bill for facilitating the Administration of Justice in Courts of Equity. In illustration of the plans suggested by him for the amendment of the laws we may refer to the speech delivered by him on the 19th of March,

The shadows which cross our path during our progress through life are not unfrequently caused by our standing in our own light: it was not so with Lord Lyndhurst. Turn as the wheel of fortune might, a prize was sure to drop at his feet. He probably asked, and certainly accepted judicial office at the hands of that political chief whose principles of government he had, throughout many years, condemned, and whose measures of reform he was prepared to resist.¹ Upon the accession of Earl Grey to office, in the month of January, 1831, the *ci-devant* Lord High Chancellor succeeded Chief Baron Alexander on the bench of the Court of Exchequer;² and the duties of that office he continued to discharge down to the month of November, 1834, when he again for a short period held the Great Seal.³ In illustration of the high judicial capacity displayed by him while presiding over the Court of Exchequer, it is only necessary to remind the reader of the judgment delivered by him in the great cause of *Small v. Attwood*⁴—a judgment to which, although it was subsequently reversed in the House of Lords,⁵

1830. The first Bill submitted by him was, "A Bill for altering and amending the Law regarding Commitments by Courts of Equity for Contempt, and the taking Bills *pro confesso*;" the second contemplated a consolidation and amendment of the laws relating to property belonging to *femes covertes*, idiots, lunatics, and persons of unsound mind: the third Bill was one for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees. *Vide*, for his views of the nature of law amendment, a speech delivered by him on the 22nd of March, 1830.

¹ *Vide* Law Mag. and Quart. Rev. vol. ii. pp. 472-475; and vol. iii. pp. 295-297. *Vide* also Roebuck's "Hist. of the Whig Ministry," *et cetera*, vol. i. pp. 326, *sqq.*; and the "Mirror of Parliament," p. 507 (2nd March 1830).

² *Vide* Crompton and Jerv. Ca. in Exchequer, vol. i. p. 386. He took his seat as Chief Baron on the 14th of January, 1831.

³ *Vide* Supplement to the *London Gazette* for the 21st of November, 1834. He was, on this second occasion, Lord Chancellor from the month of December, 1834, to the month of April, 1835. Lord Brougham resigned the Great Seal on the 21st of November, 1834, and it was on the same day delivered to Lord Lyndhurst, who continued to hold *conjointly* the offices of Lord High Chancellor and Lord Chief Baron of the Exchequer until the 23rd of December following. He took his seat in the Court of Chancery on the 22nd of November. His decisions at this period begin with Mylne and Ke. Rep. vol. ii. p. 292.

⁴ *Vide* Younger's Exchq. Rep. vol. i. pp. 455, *sqq.* (1st November, 1832) and pp. 533, *sqq.*

⁵ *Vide* Clarke and Finn. Rep. vol. vi. pp. 394, *sqq.* The Earl of Devon, the Lord Chancellor (Cottenham), and Lord Brougham, pronounced their opinions against the judgment of the Court below. Lord Wynford thought that the judgment of Lord Lyndhurst could not be shaken. This cause

he firmly adhered, and which, on appeal, he vindicated with an accuracy and discrimination equalled only by the grasp of intellect which he brought to bear upon the hearing of the original argument. There was little or no difference of opinion among their lordships upon any point of law. The whole case hinged upon questions of fact, as to whether certain representations, verbal and written, were false and fraudulent; and consequently it involved the careful consideration of a vast variety of facts and circumstances—of minute, intricate details of transactions and accounts, suggesting an endless succession of presumptions and probabilities. To the task of calling light and order out of such a chaos the powers of Lord Lyndhurst were peculiarly adequate; and upon no occasion throughout his professional life was his searching perspicacity of mind more vigorously called into exercise. Throughout the progress of this celebrated instance of litigation he commanded universal admiration; and, though ultimately adhering to his original opinion, he dissented from the views of other noble lords with hesitation and regret, and submitted with much good feeling to the reversal of his original decree.

Then came on the era of the Reform Bill. We have no intention to revive by a single breath the smothered conflagration. We would not convert biography into a vehicle of offence to political opinions or prejudices. We allude to the subject merely as having been the occasion of once more calling forth Lord Lyndhurst into the field, equipped to meet and strongly to wrestle with the mightiest of his antagonists. He took an active part in opposition to a measure which he deprecated, as being pregnant with danger to the constitution; as being "a wild change" in the composition and character of the House of

was argued in the Court of Exchequer on the 21st of November, 1831, and twenty following days: Lord Lyndhurst delivered judgment, after a year's consideration, on the 1st of November, 1832. Upon appeal, the hearing of the cause in the House of Lords lasted, on the first occasion, during sixteen days, and subsequently, during thirty days. Altogether, about seventy days, in the Court of Exchequer and House of Lords, were occupied in the hearing; the discussion during forty of those days being before the latter tribunal. The printed papers in this monster case exceeded 2,600 folio pages; and Lord Brougham remarked that he had been furnished with copies of the arguments used in the House of Lords alone amounting to about 10,000 brief sheets.

Commons. It was, however, on the second reading of the Bill that he delivered the speech which commanded the admiration of his bitterest political enemies. Lord Brougham had, after one of his greatest oratorical efforts, resumed his seat; and Lord Lyndhurst rose. The tempest had been hushed, and now was heard the "still small voice." Passions, sympathies, were now all silent, doing homage to the severest reason; and, if intellectual powers were unfortunately the only qualifications for admission to the ranks of the Upper House, the proudest of England's peers might, that night, have paused before they touched a constitution through the portals of which a Lyndhurst and a Brougham had found access to their councils.

Throughout the months of April and May, 1833, Lord Lyndhurst continued to join in the discussion of various minor measures connected with the general business of the country, as well as with the amendment of the laws.¹

During the administration of the Duke of Wellington, between the close of the year 1834 and the spring of the year 1835, Lord Lyndhurst, as we have already hinted, held the Great Seal. Another change, however, was approaching; and on the dissolution of the Ministry, in the month of April, 1835, he once more withdrew from the woolsack.² But upon the formation of the Melbourne Ministry, the ex-chancellor, far from relaxing his exertions, became more than usually vigilant in ascertaining and expounding the real nature and tendency of the various measures submitted to the consideration of the Legislature. It was far more congenial to his nature and habits to criticize plans suggested and matured by others, than to originate any comprehensive scheme of reform, by which the constitution, civil, ecclesiastical, or strictly legal, might be improved. Whatever he

¹ *Vide*, for instance, H. P. D. vol. xviii. p. 790, for his statement of the principle of the Limitation of Actions Bill; his objections to the Local Jurisdiction Bill; *ibid.* pp. 868, *seqq.* (17th June, 1833) for his objections to the Local Jurisdiction Bill; compare p. 1062, and particularly p. 1118. *Vide* also (4th July, 1833) his views with reference to the will of Mr. Thellusson,—a will founded on selfish vanity, its object being to identify the name of the testator, after the lapse of a long period, with matchless wealth.

² On the 3rd of April, 1835, the Ministry had been left in a minority on Lord John Russell's motion as to the state of the Irish Church; and, upon the 8th of April, the Duke of Wellington informed the House of Lords that Ministers had resigned.

Lord Lyndhurst's Speech

... was executed with
... he threw aside
... in any scheme pro-
... the manner with which he
... or confusion of
... of his own remark,
... the good fortune to
... connected with
... many alte-
... alterations
... His
... marriage within
... was valuable; and,
... of his earlier exertions in
... more ardent than
... and culti-
... Lord Lynd-
... and domestic
... of those speeches⁶
... which may be referred
... of his parla-
... to be a review or
... which happened to be
... as well as in the
... Compreh-

... July, 1838).
... Angelo Taylor
... February, 1827, with the
... an alleged infrac-
... H. P. D. 3rd ser.
... August, 1835), the
... the constitu-
... the scheme
... the Reform Bill, and for
... a Speech delivered by
... on the 13th of
... of this speech.
... the Right Hon. Lord Lynd-
... of August, 1829."

sive without being loose or confused; minute and yet not trivial or tiresome, these orations—for such they may be called—are striking examples of the grasp of Lord Lyndhurst's mind, of his extensive and accurate knowledge, of his powers of arrangement, and the simple vigour of his style. Though studiously calm and dispassionate in tone, there are interwoven passages of grave rebuke and severe sarcasm; for the spirit of even Lord Lyndhurst, placid and impenetrable while basking in the sunshine of office, became restless and ruthless while brooding over the opposition benches. No sooner was a political foe at the helm of affairs than he waved his divining-rod to evoke the tempest. Who can have forgotten, for instance, the scene which occurred in the House of Lords¹ respecting the appointment of Viscount Ebrington to the office of the Lord-Lieutenancy of Ireland? Lord Lyndhurst fastened upon words,² which had dropped from the recently-nominated viceroy, which, he conceived, incapacitated the noble lord for a due discharge of his high office; whereupon the Marquis of Lansdowne, by way of retort, reminded his adversary, that if any man was interested in not having particular expressions selected for remark without their context, in proof of disqualification for office, that individual was Lord Lyndhurst himself.³

A thrust, however, which could be dexterously parried by the cool self-possession of the Marquis of Lansdowne, was fatal to

¹ On the 28th of February, 1839 (H. P. D. 3rd ser. vol. xlv. p. 950).

² Viscount Ebrington had, in the course of a debate, stated that although he did not approve of the Irish Tithe Bill, he should support it; and why? "Because," said the noble lord, "I consider that the effect of it will be to render the war which is now raging against the Protestant Church of Ireland more formidable." Compare, however, the speech delivered on the 4th of March, 1839, by Viscount Ebrington, in which he explained the language imputed to him. Lord Lyndhurst, however, persisted in vindicating the course which he had pursued.

³ This palpable hit was in allusion to the alleged fact of Lord Lyndhurst having, while a member of the House of Commons, applied the word "aliens" to the people of Ireland. Lord Brougham advanced to the rescue of his friend, and stated that the difference of the two cases was simply this,—that Lord Lyndhurst had denied having uttered the language imputed to him; whereupon the Marquis of Lansdowne remarked, that the noble and learned lord (Lyndhurst) "had not denied a word of it." The statement of the Marquis of Lansdowne, so far as our knowledge extends, was correct. There had been *attempts at explanation* of the offensive expressions; but we are not aware that the noble lord had explicitly denied the truth of the allegation that they had dropped from him.

the more ardent temperament of Viscount Melbourne. Lord Lyndhurst having, exactly twelve months before¹ the skirmish to which we have now alluded, called the attention of the peers to the evil effects inseparable from the system of solitary confinement pursued at the Millbank penitentiary, the Minister thought proper to characterise the statement as "calm and *artful*." "I hope," replied Lord Lyndhurst, accompanying the words, which fell from him in the blindest tones, with one of his most contemptuous smiles, "that the statement I made was calm; but I assure your lordships that it was not artful. . . . That the noble viscount, and the other members of the Government," continued he, with a look of scorn, "should be ignorant of the facts contained in the statement which I made, only proves that they are as ignorant of their domestic duties as they are incapable of managing the colonial affairs and foreign relations of the country." Lord Melbourne, stung by this remark, complained with warmth, as he had already done, of the course taken by Lord Lyndhurst in provoking a discussion on topics of which due notice had not been given to the Government. "I wish," exclaimed he, in a paroxysm of rage, "that the noble duke (Wellington) had been here;" then, turning towards Lord Lyndhurst, he continued—"the noble duke would have sooner cut his right hand off, than have taken such a course as that taken by the noble and learned lord: the noble duke is a gentleman; the noble duke is a man of honour." Suddenly a cloud settled over the features of the insulted peer: the compression of the lips, and the gleam of the eyes, revealed the thunder which was sleeping within. A dead stillness reigned throughout the house. Lord Lyndhurst rose from his seat, and spoke in a calm, firm tone:—"The noble viscount says he wishes the noble duke had been here, because the noble duke is a gentleman, and a man of honour. That observation, which is true of the noble duke, was applied by the noble viscount in such a manner as to bear a different construction when applied to others: I beg an explanation." Lord Melbourne would have shrunk from grappling with his strong antagonist. "When I said that the noble duke," remarked he, "was a gentleman and a man of honour, I

¹ 26th February, 1838. *Vide* H. P. D. 3rd ser. vol. xli. pp. 93, *seqq.*

did not say that anybody else was not a gentleman and a man of honour." This paltry subterfuge was of no avail. "The words," rejoined Lord Lyndhurst, "are capable of a particular construction : again I ask the noble viscount what he meant by them." The Premier not having risen to answer the question, Lord Lyndhurst quitted his seat, and was in the act of leaving the house, when Lord Brougham—the only man, probably, who might with safety venture to interfere, for

"'Tis dangerous when a baser nature comes
Between the pass and fell incensed points
Of mighty opposites"—

started to his feet, and entreated his friend to remain. The latter resumed his seat. A few remarks then dropped from Lord Brougham. Lord Lyndhurst once more rose, and with a look and tone which could not be misinterpreted, demanded an explanation. "I must insist on knowing," said he, "from the noble viscount, whether he meant to convey an imputation on my character ; whether he meant to say that I am not a man of honour." Lord Melbourne's better feelings had speedily prevailed. He admitted that he had allowed himself to be carried away by passion. "I do not recollect"—such was his confession—"what I said : I do not know what were the words I used in the excitement of the moment ; but I distinctly state, that if I said anything in reference to the noble and learned lord, to the effect that he had acted unlike a man of honour, or in any way unbecoming a gentleman, I most fully retract the words." Lord Lyndhurst immediately declared that he was satisfied.

Nor were these random attacks upon the Ministry : his alacrity at self-defence was not without its object. No man had less veneration for the maxim of Cicero, "*Vult plane virtus honorem ; nec est virtutis ulla alia merces.*"¹ The dreary defiles of the

¹ De Republicâ, iii. 20. The generous sentiment of the Roman orator met with no response in the breast of Lord Lyndhurst, whose whole nature was in unison with the more practical reflection of Massinger, in (if we mistake not) his "Fatal Dowry :"—

"In this avaricious age,
What price bears honour ? Virtue ? long ago
It was but praised, and freezed ; but now-a-days
'Tis far more cold, and has not love nor praise."

opposition benches presented to his eye only "a boundless ambiguity of shade," from which he would gladly have escaped, even while he found it a convenient ambush from which to annoy the enemy. The Cabinet was not strong, and unfortunately it was most vulnerable in its very head. From every new assault it retired in a more crippled condition : the whole body had become sick, and the whole heart faint ; and the wily politician saw that a few well-directed blows would induce a general debility and a speedy dissolution. The storm of Catholic Emancipation had long ago been hushed : the last echoes of Parliamentary Reform had gradually died away ; and the wailings of Richard Cobden had not yet broken on the ear. Lord Lyndhurst knew, therefore, that no season could possibly be more opportune for a return to office. If the Cabinet of Lord Melbourne could only be broken up, he might anticipate another long reign in high office, with all its attendant blessings. We do no injustice to Lord Lyndhurst while we trace to no more disinterested motives his wondrous activity at this period—activity, too, which proved successful. He attained his ends ; he once more realized the object of his ambition.

Parliament having met on the 19th of August, 1841, the Ministers of the Crown found themselves, in the course of a few days, in a minority on the terms of the Address in answer to the Speech from the Throne ; and on the 30th of the same month, Lord John Russell stated in the House of Commons, that Ministers had, in consequence of their defeat, resigned. The arrangements of the new Government having been completed, Lord Lyndhurst appeared, for the third time, as Lord High Chancellor of England.¹ At this period² his attention was, with few exceptions, specially devoted to the discharge of his judicial duties ; and his speeches in the House of Lords became more intermittent.

¹ He continued to hold the Great Seal from the month of September, 1841, to the month of July, 1846. The cases decided by Lord Lyndhurst during his last tenure of office are reported by Thomas Joddrell Phillips, Esq., Barrister-at-Law.

² In the meantime, however, his University had not been forgetful of him ; for, in the year 1840, he had been, after a contest in which Lord Lyttelton was his opponent, elected Lord High Steward. Lord Lyndhurst had 923 votes, while Lord Lyttelton received 457 votes.

The change of position was regarded by all who knew Lord Lyndhurst as the certain precursor of a change of opinion, and the process of political transformation was not, on this occasion, either slow or doubtful; for, in the beginning of March, 1842, Lord Campbell, on presenting his Bills relating to the Appellate Jurisdiction of the House of Lords, and other legal improvements, discovered, to his mortification, though probably not to his surprise, that Lord Lyndhurst, now that he was warm in office, had become cool in many other respects. Indeed, the latter presumed even to taunt Lord Campbell as being importunate on the subject of law amendment, simply because he happened to have at that time¹ nothing better to do. Nor was this the only field of legislation in which the weak points of the Chancellor were laid bare and exposed to public view by his sturdy assailant. All must remember the struggle between certain ecclesiastical parties which took place in Scotland with reference to the settlement of parish ministers, and the utter failure of Lord Aberdeen's inept and ill-fated measure. The interests of the Church of Scotland had been wantonly put in jeopardy by an arrogant resistance to a judicial decision of the highest tribunal in the land; and, while Lord Brougham, Lord Cottenham, and Lord Campbell condemned the measure as a compromise of the rights of the Church of Scotland, as well as an insult offered to the Court of Session, Lord Lyndhurst supported the measure, probably because he was indifferent about any results which it might have in the northern quarter of the kingdom. "The noble lord on the woolsack"—this was another smart hit from Lord Campbell—"appears to have received some sudden illumination with respect to this subject. On a former occasion he expressed his entire and decided approbation of the judgment in the Auchterarder case, and not only of the judgment, but of the reasons on which it was founded. These reasons were, that the Church was, in reality, possessed of no such power as the noble and learned lord *now* found it had exercised from time immemorial." Lord Campbell further remarked, that "he could not remember any instance in which expediency had so triumphed over fact; and expressed his amaze-

¹ 1st March, 1842.

ment at the noble lord's (Lyndhurst's) *singular change of opinion.*"

Although Lord Lyndhurst continued, throughout the years 1843 and 1844, to take his share in the discussion of some minor questions, nothing new occurred to illustrate his character or to indicate any recent phase of his sentiments. Extending our retrospect even no further than to these two instances of laxity of principle, he must have been conscious, we conceive, that with all his acuteness, grasp of intellect, and various information, no authoritative weight could be attached to any speech which he delivered.¹ Fortunately for himself, he had no longer temptation to join in warm debate. Advancing old age and set desires had combined naturally to check his aspirations and chasten his temperament. His public appearances, except in his judicial capacity, became, week by week, more rare and incidental,² although certainly the persecutor continued to be on his track.³ He occasionally, however, went forth to battle in all his native dignity and with much of his pristine strength.

¹ We have seen that he at one time opposed and at another time supported the Catholic Relief Bill; and we admit that he denied having altered his course for the purpose of retaining possession of office (24th February, 1835). On the 24th of June, 1837, he expressed a hope that no countenance would be given to the alarm and apprehension to which the Church establishment was exposed, and that "perfect security would be afforded to the Protestant faith, to which the people of this country were so strongly attached." Even at so late a period as the 22nd of July, 1851 (H. P. D. vol. cxviii. pp. 1223, *seq.*), when the Ecclesiastical Titles Assumption Bill was under discussion, he made a last attempt to prove that perfect harmony reigned through all his words and acts with reference to the Roman Catholics; while, at the same time, he expressed his intention to vote for the second reading of that Bill. He warned the House against the designs of the Catholic Church. He would rescind nothing which had been already done; but he was not prepared to go a single step further.

The tide of Liberalism, however, which thus seemed to be ebbing, so far as the influence of Lord Lyndhurst extended, from Popery, was, ere long, to turn, and flow copiously in upon Judaism (4th of May, when the case of Mr. Salomons was under consideration). *Vide* also the speech of Lord Lyndhurst on the 10th of March, 1845, when he moved the second reading of the Jewish Disabilities Removal Bill.

² "I have not been in the habit," said he, on the 19th of June, 1849, "for many years of addressing your lordships."

³ *Vide* a straightforward statement made by him (28th of August, 1846), in answer to some reflections which had been cast upon him, according to the reports of the public press, in the House of Commons respecting the exercise of his official patronage.

He never ceased to watch over all important legislative enactments connected with the regulation of the multifarious interests inseparable from the administration of affairs throughout so vast an empire as that of England.¹ In proof of the unimpaired vigour of his faculties, it may be sufficient to refer to the judicious exposition given by him² of the duties incumbent on those refugees who seek the protection of English law and enjoy the blessings of English freedom. Their conduct, he conceived, ought to be inoffensive, and not such as to embroil with foreign states a land in which they, exiled, find an asylum and a home. We might point, likewise, to his masterly elucidation of the claims of the Baron de Bode, a topic involving various complex details, all of which were analyzed, arranged, and weighed by Lord Lyndhurst, unassisted though he was by reference to a single note, with a promptitude and precision which have rarely been equalled.³ During the last two years he has never lost sight of the leading events connected with and the vast interests involved in the settlement of the Eastern Question. From the day on which he first publicly announced the construction which he had given to a passage in the Circular Note of Count Nesselrode, to the effect that the Russian forces would not quit the Danubian Provinces until the Porte complied with the demands of the late Emperor Nicholas, and the united fleets of England and France had left the Turkish waters, down to the most recent events which have sprung out of our foreign relations, Lord Lyndhurst has displayed extensive and accurate

¹ *Vide* his remarks (18th of June, 1851) during the debate on the Irish Leasehold Tenure of Lands Bill; as to the interest which he took in the progress of Lord Campbell's Bill for the Registration of Assurances, *vide* H. P. D. vol. cxvii. p. 977 (19th of June); for his jealous defence of the privileges of the House of Lords, *vide ibid.* (23rd of June, 1851). On the 18th of February, 1852, he proposed a measure with a view to facilitating parliamentary proceedings; and on the 30th of March, 1852, he drew attention to the expediency of reviewing the course of judicial proceedings in matters of lunacy. *Vide* also his inquiry (3rd of March, 1851), and a short discussion which he originated on the 20th of July, 1855.

² He alluded particularly to an association in London called the "Central National Italian Committee," to a second known as the "Central Democratic European Committee," and to a third designated the "Central Committee of Hungarian Refugees."

³ We might likewise allude to the admirable judgment delivered by him in the case which is known to lawyers as the "Bridgewater Case." *Vide Times*, 20th August, 1853.

information, while his conclusions based on such knowledge have commanded the assent of even political antagonists.¹ In the month of February, 1854, he called attention to the celebrated Vienna Note; and, on the 10th of April, he inquired as to the truth of the report that the Russian Government had seized not only the property of Sir Hamilton Seymour, but that likewise of Lady Seymour, at St. Petersburg: "If this be true," said Lord Lyndhurst, "it is a gross violation of the admitted law of nations, and ought to exclude Russia from the class of civilized nations;" and the subsequent progress of events seemed only to keep alive his interest in the affairs of the East. His speech,² for example, on the convention between Prussia and Austria was, in all respects, worthy of his palmiest days. His anxiety concerning our military operations became apparent at the very commencement of the present year; for he watched with suspicion the conduct of the Ministry, while, at the same time, he was extremely unwilling to embarrass it by any hostile movement during a period of difficulty and danger. Having, on the 25th of January, given notice of his intention to move a resolution, the discussion of which might have disconcerted Ministers, he, on the 8th of February, withdrew it. In the meantime, his solicitude for the efficiency and comfort of the army had not abated,³ nor were his suspicions of Prussian policy allowed to sleep.⁴ He disclosed to the eye of Europe the irresolution and duplicity of Prussia; and on no occasion, throughout the whole of his long career, have Lord Lyndhurst's high intellectual powers more conspicuously shone. Conscious of the importance of this country having a clear view of the actual

¹ On the 12th of July, 1853, Lord John Russell having, in the House of Commons, thrown some doubt on Lord Lyndhurst's construction of the Circular alluded to, the Earl of Clarendon admitted that his colleague, at the time when he made the observation, had not attentively read the Note: Lord Clarendon, to some extent, concurred in the view which had been taken of it by Lord Lyndhurst.

² On the 19th of June, 1854, *vide Times* for 20th of June, 1854; and "The Eastern Question: being Substance of the Speech delivered in the House of Lords, on the 19th of June, 1854, by the Right Hon. Lord Lyndhurst. London: 1854."

³ *Vide* H. P. D. 23rd February, 1854.

⁴ *Vide* his remarks, 2nd March, 1855.

position of Prussia with reference to the late inept negotiations at Vienna, he presented her policy in its true light. The outline bore the impress of his bold and steady hand. The object of Russia was, he stated, the possession of Constantinople, and the overthrow of the Ottoman Empire; and he regarded the conduct of Prussia to be such as to favour the prosecution of that iniquitous design. He, with his usual unrivalled perspicuity and simplicity, took a rapid review of all the documents emanating from the Prussian Cabinet and acts done by it, anterior to the invasion of the principalities, by way of proving that throughout all the transactions it had uniformly pursued the same crooked line of policy. He reminded that Power that similar features of State-policy had been displayed by her as far back as the year 1794. He unveiled her diplomatic contrivances. He expressed a belief that the interests of Germany are more closely involved in the conduct which she chooses to pursue than are those of the Western nations. He branded the Government of Prussia at having been the originator and instigator of the partition of Poland—the most nefarious political transaction that ever occurred—and proclaimed that, down to the present day, all its public acts had been of the same unscrupulous character. Not long afterwards,¹ he threw Austria into his crucible, and put her through an equally severe ordeal. His censure, however bitter in its spirit, was conveyed in a calm and dignified tone, which formed a striking contrast to the coarse abuse which had been lavished upon Austria in the Lower House and through the public press. In his rebuke he blended the accuracy of the judge with the diction of the orator. In a strain of unbroken discourse he rivetted the attention of the House of Lords; and yet there was no violent invective with a view to rousing indignation against the misdeeds of either of these two Powers. The facts were so striking, and were all so admirably arranged, that Lord Lyndhurst attained his object through the medium of consummate rhetorical skill.

Few men, probably none, have filled so many high and honour-

¹ 19th of June, 1855: *vide* particularly his speech on the 25th of June, 1855.

able offices in the State,¹ or discharged the duties attached to these with more enlightened energy or more fascinating courtesy. He has built up for himself a name and a peerage, although not, it is said, a fortune commensurate to his rank, his merits, and his toils. In the House of Lords he succeeded to much of the influence which had been enjoyed by the Duke of Wellington; and even now he is still "the old man eloquent." Wordsworth, in one of his Sonnets, has written—

"Men are we, and most grieved when even the shade
Of that which once was great has passed away;"

but, advanced in years though Lord Lyndhurst be, such language is wholly inapplicable to him. He still survives in all his substantial majesty. He has carried with him into comparative retirement that activity and penetration of mind which he has throughout a very long life pre-eminently displayed; and we rejoice to think that, while we write these lines, so vigorous is his health and so buoyant his spirit that, in the society of those whom he loves, he is enjoying the rich and varied feast which a man of high intellect and refined taste cannot but derive from a tour on the continent of Europe.

Lord Lyndhurst, we have seen, has always been remarkable for the ability displayed by him in summing up into one compact form the various details and the scattered evidence illustrative of protracted and intricate transactions. Without affecting to possess, in any degree, the focal power which rendered his statements models of forensic and judicial composition, we may, while drawing to a close, be permitted to cast another glance over the facts which have been narrated and the features of mind which we have caught, with a view to reflecting from these pages the more deeply marked lineaments of his character. The outline of the portrait may appear sometimes hard and irregular, but it has been faithfully sketched: the colouring is true,

¹ Looking at his academic and literary honours, we find him to be B.A.; M.A.; Fellow; D.C.L.; High Steward; F.R.S.

In the professional and civil department of his life, his progress is thus distinguished:—M.P.; K.B.; Sergeant; King's Sergeant; Chief Justice of Chester; Solicitor-General; Attorney-General; Master of the Rolls; Lord Chief Baron of the Exchequer; Lord High Chancellor, *three several times*; and Privy Councillor.

though it occasionally presents glaring contrasts. It has been our aim rather to recal the materials with which he has himself furnished us, than to dogmatize upon the incidents which have been recorded. As the fossil-ink peculiar to the mollusc cephalopod has, according to naturalists, been occasionally found in so perfect a state of preservation, that a portion of the mineralized fluid has actually served as a pigment wherewith the artist portrayed the animal, so the form and colour of this outline have been supplied by Lord Lyndhurst himself. We have allowed his character to be, as it were, self-developed, and have endeavoured to fasten its tints before they have for ever passed away. We would neither be lavish of panegyric on the one hand, nor, on the other, would we indulge in diatribe. Under such influences biography becomes an illusion, and history itself a snare.

The high faculties with which Lord Lyndhurst had been by nature endowed were, from his earliest years, assiduously cultivated by voluntary submission to a course of the severest discipline, conducted through the careful use of efficient means to the attainment of the best intellectual ends; so that, even prior to the close of his academic career, a broad and solid foundation had been laid by him for the massive structure which it was destined to support. Continuous perseverance in the acquisition of knowledge, whether useful, ornamental, or only elegant and amusing, guarded him in youth against mental sloth: his occupations, too, though varied, were never desultory. A spontaneous, cheerful devotion to the study of the exact sciences so braced his intellectual powers, that lighter and less severe pursuits were shaped into order and mutual harmony; and accordingly, though steadily mastering many accomplishments, all these took the impress of his well-trained mind, which, in its turn, acquired increased flexibility and strength. The plants of scientific knowledge and accurate scholarship which he had thus been cultivating bore, ere long, their natural and rich fruits—precision of thought and apt simplicity of diction. His legal and political speculations were seldom tinged with the colouring of imagination: he seemed to be jealous of elaborate ornament, lest it should conceal or mar the clear sharp outline which pure

reason had defined. Neither was the ear laden nor the understanding bewildered by verbal or logical exaggeration : not a phrase escaped from him akin to the copious rotundity which false taste admires. "No man," said Lord Brougham,¹ with a generous appreciation of his noble friend's powers, "expresses himself more clearly ; I may say, few men think so well on any subject to which he applies his vigorous understanding."

His speeches at the Bar were at once concise and lucid, chaste and elegant : the same simple style pervaded his parliamentary orations ; and yet neither in the one sphere of exertion nor the other was a dull surface presented to the eye. His addresses, though smooth, were relieved by sparkling points : at the Bar as well as in Parliament he was—

"Though deep yet clear, though gentle yet not dull,
Strong without rage, without o'erflowing full."

These attributes, too, in themselves invaluable to one who was more distinguished for expertness as an advocate than for the profoundness of his knowledge as a lawyer, were all infinitely enhanced by the affability of his manner. No man possessed more of the quality which the Circassians call *titlu-dil*, that is, *sweet-tongue* or *fair speeches* : he was courteous to all, even to political foes—offensive towards none : no envenomed personality tainted either his heart or his style ; indeed, cold sarcasm appears to have been, more than coarse vituperation, congenial to his nature. The general effect was completed by the charms of his personal gracefulness. Imposing in stature and grave of aspect, he yet won the confidence of all who approached him ; external dignity being shaded and softened by ineffable blandness. Such a man, at the epoch especially when he first entered upon public life—a period during which Europe was writhing in political throes—could scarcely fail to assume a high position among English advocates and the representatives of the English people ; for in him the boldness of the tribune was tempered by the calmness of the orator.

Proud of the profession to which he belonged, and impatient of encroachment upon its privileges, he has at the same time

¹ 7th of June, 1839.

ever been jealous of its undue preponderance in the State. Impressed with a deep sense of the influence, for weal or woe, of the members of the English Bar, he has always professed anxiety that its honour should be unsullied, and that the talents and virtues embodied in it should be developed on the side of social order and happiness. "In trying and troublous times," said he, "there is no body of men so powerful for good or for mischief—active, restless, ambitious, intelligent, acute, prepared for public life by previous habit, education, and discipline—there is no imprudence greater than to throw the whole force of this formidable class into the democratic scale." Lord Lyndhurst might himself have sat for the portrait; and from an early period of his public career, he, true to the tenor of his own admonition, has contrived again and again so to adjust the balance, that his eye might watch and his hand might tamper with the scale in which the golden weights were to be found.

The decisions delivered by Lord Lyndhurst, whether while presiding over the Court of Exchequer or the Court of Chancery, gave, beyond all doubt, very general satisfaction. His progress, though slow—in consequence, perhaps, of his strictly business habits being in some measure desultory—was steady and sure. His cool, dispassionate mind embraced the merits of each case, as it was unfolded to him, with a quickness of apprehension amounting almost to intuition. Impartial, patient, affable, he proved that affected sternness is not inseparable from the dignity of the Bench; and that, conscious of his strength, he might, without sacrificing self-respect, or degrading judicial rank, be condescending and kind. Imperiousness towards counsel, solicitor, or suitor,¹ was utterly alien to the nature of Lord Lyndhurst.

While we have a perfect recollection and a just appreciation of any improvements which Lord Lyndhurst may, from time to time, have suggested, or even incidentally contributed to pro-

¹ Mr. Cleave, who, on being tried in the Court of Exchequer, acted as his own counsel, having begun his speech by remarking that, before he sat down, he should, he feared, give an awkward illustration of the truth of the old adage, viz., that he who acts as his own counsel has a fool for his client, "O, Mr. Cleave," said the Lord Chief Baron, "don't you mind that adage; it was framed by the lawyers."

mote, in the ancient legal system of England, and admitting, as with Lord Brougham we do, that any objections on the part of Lord Lyndhurst to measures of law amendment were stated by him in a candid spirit and with calmness of temper, still, it is impossible to resist the impression that his movements in that direction were far from being spontaneous or steady; and, as unfortunately at those very periods of his career when by his connection with Government he enjoyed the most favourable opportunities for promoting such schemes he uniformly contrived to find a pretext for inertness in the cause, he exposed himself to castigation at the hands of men infinitely inferior to himself, but who neither could nor would shut their eyes to the abuses which had crept into the practical administration of English jurisprudence. He was, no doubt, aware that the most beautiful structure, if so neglected as to be overrun with rank and noxious weeds, may be mistaken for a ruin and be considered useless for the common purposes of life; and accordingly he occasionally put forth his hand to remove extraneous incumbrances and reveal the strength and grandeur of the building. Our legal system, he well knew, is, though certainly not paradisaic, a tree of the knowledge both of good and evil; but wisely he would not root it up: nay, he was by nature and habit more inclined to add something new than to extirpate anything old. Fresh twigs he would here and there engraft, but it was with reluctance that he consented to the amputation of this or that rotten limb; and the operation, if undertaken by him, was not unfrequently so mischievously performed as to shake dust into the eyes of the gaping multitude.

In Parliament, as at the Bar, he was self-possessed and cool, though impressive. Even his personal appearance at once caught the attention of a stranger. His physiognomy bore the impress of powers and habits of deep thought. The forehead high and ample; the eyebrows shaggy and prominent, beneath which, in his earlier days, flashed two keen and sparkling orbs; the mouth indicative of firmness and quiet decision of character; and the scowl which occasionally stole over the sunshine of his placid countenance—all attracted the gaze of the spectator. As an orator, he was in attitude and action graceful; and thus the

fringe, as it were, of his speeches, added materially to the effect produced. Those who have heard and seen Lord Lyndhurst, while delivering one of his most elaborate orations in either House of Parliament, and who have subsequently read even an accurate report of the sentiments and language which fell from him, must be conscious that opinions and trains of reasoning which won their assent have, on calm reflection, and when no longer under the spell of the voice and manner of the orator, appeared dubious or erroneous. The web and woof of the speech were still the same ; but the ornaments which concealed or drew away the eye from its defects had been withdrawn. A vein of irony, too, lay concealed beneath the smooth surface of his manner ; and, as Chinese jugglers extract from the mouth yard after yard of silk ribbon, glittering with sharp-pointed needles, there lurked beneath the passionless courtesy of Lord Lyndhurst contemptuous indifference or stinging sarcasm. The matter, too, of his speeches was in perfect harmony with the mode in which they were delivered. He could, like Lord Loughborough, separate with ease the lawyer from the statesman. He was exceedingly specious ; and that the pleasing harmony might be unbroken, he had recourse, as occasion required, if not directly to the *suggestio falsi*, to, at all events, the *suppressio veri*. He was a consummate actor. Even rival performers ventured occasionally to tear off the mask, and then he was disconcerted. In the presence of honest politicians of either party, he had a difficult part to play ; but he generally, with matchless skill, finished it with *éclat*. He must, however, have frequently felt the—politically speaking—moral superiority of men who had no pretensions to vie with him in intellect or attainments. Honesty, even in public men, is, after all, the best policy. The counterfeit, in the presence of manly, patriotic independence, is, sooner or later, as the serpent-rods of the magicians were swallowed up by that of Moses, certain to be abashed and destroyed. Rarely, indeed, has any one entered the British House of Commons so richly endowed with all the qualities which might have encouraged him to pursue, with unbending integrity, an honourable career. But on party emergencies, to which more self-denying politicians must have yielded, Lord Lyndhurst, through flexi-

bility of principle, prevailed. At no crisis of public affairs have his views risen above personal exaltation ; nor was he encumbered with nice scruples as to the means by which his ends were to be attained. Few men can with more accuracy interpret the meaning of the language uttered by a master of the art in which Lord Lyndhurst himself excelled, and in the character of no modern politician can be found so apt an illustration of its truth.¹ By alternate menace and concession he has laboured sometimes for evil, though more frequently for good ; but always having at heart rather his own immediate interest than the prosperity and glory of the State. Strangely indeed would sound upon the ear the noble language of Cicero,² if it were heard dropping from the lips of Lord Lyndhurst : “ *Virtute enim gubernante rempublicam quid potest esse præclarius quam is qui imperet aliis, servit ipse nulli cupiditati.*” Improved combinations of the social system, and wider expansion of principles of jurisprudence, were viewed by him with cold suspicion. Throughout his entire public life Lord Lyndhurst has, at the bar or in the senate, in open debate or secret intrigue, been carrying on a struggle for personal promotion, and not unfrequently has he expended a vast stock of precious strength for the accomplishment of comparatively inadequate, if not paltry ends. The bare idea of political consistency must, to a mind under such influences, and at a period of our history during which political opinions rose, or rather were allowed to sink, to violent prejudices, have appeared as an impossibility—an absurdity. Political differences, like dissensions in private life, are, no doubt, happily allayed by personal conference ; and enmities disappear when individuals of conflicting creeds learn to be more familiarly known to each other. Statesmen,—precisely as the trees, when we enter an avenue, which on opposite sides are seen widely apart, appear towards the close of the long vista almost to meet—who at the outset of their career stand far asunder,

¹ * * * ‘ως εστι μαλιστα τουτο δεον μη πανουργος ων και δεινος ανθρωπος πραγμασι χρησθαι, τα μενεικων τα δε ημας διαβαλλων τρεψη τε και παρασπασθαι τι των ολων πραγατων.—Demosth. Olynth. I. The plain English of which is, that a busy, clever, and cunning man may, by now yielding and now resisting, fatally entangle and defeat public measures.

² Cicero, de Republicâ, i. 34.

gradually approach each other, until, through mutual forbearance and the extinction of prejudices, they ultimately meet in unity and good faith. But continuous motion from side to side under every change of breeze is a sign of weakness or of artful arrangement. Consistency is a duty which now-a-days, all the great questions which had long been dividing parties having been settled either by force of conquest or through compromise, may be more easily recognised, because the practice of it involves less peril to the professional or political interests of public men; but Lord Lyndhurst appears, from the very commencement of his journey, to have been incessantly weighing the chances of success. It is recorded of a Lord Isla,¹ upon whom Sir Robert Walpole mainly depended for the management of Scottish affairs, that the key by which he regulated his political conduct was the maxim, *so to love that he might hate, and so to hate that he might love*; in other words, never so far to confide in any man as to dread breaking with him, and never so far to hate as to render reconciliation impossible. In like manner, it has always been the policy of Lord Lyndhurst to offer no offence to any party, while at the same time he gave substantial assistance to that party from which he might most reasonably hope for promotion. Without this glimpse into his soul, his conduct would sometimes be quite unfathomable. In the earlier period of his career he was a trading politician, and business flowed in upon him in consequence of the very large amount of intellectual capital and professional credit upon which his speculations rested: both were worthy of the stakes at risk—the liberal salaries and high dignities which were to be lost or won. Hence life has been to him, as it were, a great game at chess. Parties or individuals were his pawns: or, to change the figure from the player to the piece, knights and bishops were in jeopardy when the rook started forth to sweep the board. Men have been, in the hands of Lord Lyndhurst, tools for the attainment of his own ends; and yet, as frequently happens, while cajoling those beneath him, he was on more occasions than one the political slave or dupe of others. His opinions were modified, some-

¹ Vide "Memoirs of the Reign of George II.," by John, Lord Hervey p. 335.

times abandoned, at the command of the patronage-dispensing Minister of the day. God forbid that England's statesmen should ever sink to the level of mercenary politicians ! Tenacity of principle is as essential to sound political philosophy as it is admitted to be the foundation of moral rectitude. It is at once the regulator of the powers and passions of the soul, and the index of the secret and unseen movements of the human mind. There are two ways of rising in the world—*per fas*, or *per nefas* ; and Lord Lyndhurst has availed himself of both : the one or the other of these paths, though equally agreeable, was, according to surrounding circumstances, taken by him—the only question being, which of the two was the more likely to conduct him with rapidity and safety to the object which he had in view ; and to attain that object, political maxims, avowed opinions, party traditions, personal experience, were all in turn repudiated by him. The pendulous motion of his nature was so irregular, that no one could at any moment predict whither the hand on his political dial would next point : respect for public consistency interposed but a feeble obstacle between political principle and the gratification of personal ambition. His course has been so long and intricate, and his idiosyncrasy so exceptional, that in looking back from the height which he has reached, he possibly can no longer descry the winding paths by which he ascended to his present elevated position. And yet, after all, his planet has not been altogether auspicious to him. It rose in mist and dubious light : its gradual ascent, though generally bright, was sometimes obscured ; and politicians of all classes who admire consistency, and who set a higher value on the common weal than on their own personal aggrandisement, may, we fear, while they forget not its inherent lustre, behold its setting without veneration or regret. His brightness has been the bewildering glare of the meteor, not the steady, guiding light of the fixed star. In short, the political figure of Lord Lyndhurst is stately, but far from being symmetrical : when seen in all its proportions, there is more of strength than of grace to be discerned. The form rises gradually into view, until the whole takes the likeness of the image which appeared to Nebuchadnezzar in his dream ; whose head was of fine gold,

but whose feet were part of iron and part of clay. Coleridge selected the exclamations, "Hear, O heavens, and give ear, O earth," and "Ould clo'," as remarkable instances of incongruity; but equally striking incongruities have met in the public character of the eminent subject of this sketch. Janus, the patron of civilization, is generally represented as holding a key—emblem of his being the opener of avenues; and one of his attributes was a knowledge, not only of the future, but of the past. Judging of Lord Lyndhurst by his constant and keen observation of actual antecedents and probable consequents, he appears to have resembled the bi-frontal deity in that feature as well as in some of his more attractive qualities: with prospective and retrospective power of vision, he kept his eyes steadfastly fixed at once upon the past and the probably future events of party warfare, and with reluctance unsheathed his sword in any other cause than that which he knew must be victorious.

Any mind contemplating the features of Lord Lyndhurst's character or the growth of his fortunes turns naturally towards the resemblances or dissimilarities which are to be seen in the moral aspect and public conduct of one of his earliest professional competitors and most formidable parliamentary rivals. They have frequently expressed sentiments of mutual admiration; and yet, upon a comparison of their intellectual and political idiosyncrasies, there is to be detected more of contrast than of parallel. Lord Brougham, in early life, formed and cultivated by the force of natural genius tastes which in Lord Lyndhurst were fostered beneath the shade of an English university: while the one, bold and inventive, was devoting himself to physical and political science alone, the other was combining with similar speculations the knowledge and refinement inseparable from a complete classical education; and both have through life retained a love of literature and science.

The gradual accessions made by Mr. Copley to his stock of professional knowledge were more uniform and extensive than any acquisitions of which Mr. Brougham could boast in that department. While the mind of the latter expatiated over the philosophy of jurisprudence, that of the former was strictly confined to the practical principles and formal pleadings which were

daily in requisition for professional success. Both, attached to their common profession, displayed, as advocates, talents of the highest order; each equipped with weapons adapted to his peculiar mode of warfare—

“Hos mirabantur Athenæ
Torrentes pleni et moderantes fræna theatri.”

Mr. Brougham was prompt and powerful in attack; Mr. Copley was wary and skilful in defence: the one, though desultory, was energetic, and touched isolated parts and arguments with the hand of a master; the other, under the influence of a calmer temperament, and endowed with stronger powers of generalization, poured forth his logic in one clear continuous stream. Mr. Brougham, though even during the early period of his practice at the Bar giving occasionally promise of future eminence, being more remarkable for his general attainments and his love of political warfare than for legal erudition, hoped probably to reach the height of his profession through his political celebrity; while Mr. Copley aimed by professional eminence at the highest honours of the state: to that one his profession appeared to be only an accessory to his political employments; while by this the field of politics was cultivated merely because it, at the same time, yielded the most precious fruits in his profession: Mr. Brougham trusted to his political fame for advancement as a lawyer; while Mr. Copley depended upon his professional reputation as his surest path to political influence.

Both of these eminent men appear to have taken, in early life, kindred views of the nature and duties of civil government; but Lord Brougham, having shunned extreme opinions, has, without sacrifice of principle, been upon the whole consistent, whereas the movements of Lord Lyndhurst have been uncertain and variable: the line of policy pursued by the one has been, from beginning to end, direct and well-defined; that of the other has been tortuous and dim. These characteristics may be in some measure traced to the opinions which have been slowly though surely spread throughout England during the last half century; for the spirit of the times has been more auspicious to the prevalence of those doctrines which Lord Brougham ap-

proved than of the creed which Lord Lyndhurst long ago sanctioned and maintained. Each, too, was in perfect adaptation to his position; for the one, inflexible even to obstinacy, could not have changed, and the other, pliant to suppleness, yielded to the gentlest pressure or bent before the softest breeze. All the tendencies of Lord Brougham were in favour of a liberal expansion of the democratic principle, as well as a limitation of the influence of the Crown and aristocracy; while the object of Lord Lyndhurst's anxiety has been to guard the monarchy and the peerage against undue encroachments by masses of the people. The result of the labours of both—antagonistic though these frequently were—has been, like that of the conflicting elements of the monarchy itself, a preservation of the balance and a consolidation of all the interests of the British constitution.

In a legislative capacity Lord Brougham and Lord Lyndhurst have betrayed but few common sympathies. Although both are enlightened, the flame which burns within the one for political and legal reforms has communicated no genial warmth to the soul of the other: Lord Brougham has been in that cause active and bold; Lord Lyndhurst, by nature timid of innovation, and upon principle averse to change, has proved himself to be, while in office, indifferent to all reforms, and, even while in opposition, his movements have been extremely cautious and very fitful.

In Parliament both have, as orators, ample and varied resources at command; but, as the style of Lord Brougham is cumbersome and periphrastical, that of Lord Lyndhurst is terse and concise: the manner of the former is ardent and energetic, that of the latter calm and dignified; and, while the sarcasm of Lord Brougham tears the flesh of his victim, only to be soon healed, the quiet, cold irony of Lord Lyndhurst silently but surely eats into the soul, and long rankles there.

Both are alive to the charms of social life, and from the treasures of their knowledge diffuse delight among all around. During hours of relaxation and friendly intercourse the buoyancy of Lord Brougham's impulsive nature finds vent even in frank *naïveté*; but the polished manners of Lord Lynd-

hurst are linked with a strict adherence to all the conventionalities of high life. Of sincere friendship, however, both are susceptible: but while the feelings and acts of Lord Brougham warm into cordial affection, those of Lord Lyndhurst seldom rise above the level of prudential civility. Accordingly, Lord Lyndhurst is admired: Lord Brougham, besides commanding admiration, wins our love. Neither of them can be soon forgotten by a country which each, within his sphere, has faithfully and beneficially served, or by the members of a profession which both have by their talents, attainments, and exertions signally adorned.

ART. VI.—THE STATUTE LAW COMMISSION.

ITS PRESENT EXIGENCIES.

1. Report of the Commissioners for Consolidating the Statute Law (1855).
2. Copies of Replies, by Mr. Coode and Mr. Chisholm Anstey, to Observations by Mr. Bellenden Ker, contained in Paper No. 6, in the Appendix to the Report.

OUR readers will remember that we have recurred to this subject on many occasions, urging again and again the national and lasting importance of the undertaking, and the inadequacy of the measures adopted for its realization. We desire, on this occasion, to revert to our former observations, not for the sake of vaunting the fulfilment of prophecies, which were but the statement of consequences that must ensue from a disregard of obvious conditions of success in such a matter, but in order to impress upon those who have the conduct of this enterprise the importance of at once reinforcing the Commission; and, taking advantage of past experience, to adopt some plan of action which shall ensure the grand final requisites of the work—unity, uniformity, propriety, comprehensiveness, and completeness.

In our first article we presumed to indicate what, in our opinion, should constitute the scheme and composition of the Commission: that it should include, not only dignitaries of the law of the first rank, to whom should be confided questions of high policy, or the supreme direction of the matter, but dignitaries and officers of the second rank, to whom should be confided questions of practical policy, and the superior direction; and special officers, conversant with the requisites for the actual execution of the work, assisted by writers and draughtsmen, printers, index-makers, &c.

About the same time our contemporary indicated a plan of action which would cover the whole field within an assigned space of time—say about five years—providing thereby a year of preparation, in which the scheme should be arranged, the work distributed, the instructions drawn, the workers trained, and all the subsidiary arrangements should be so adjusted, that every step in the progress might proceed onward regularly without check or hindrance, with the reasonable expectation that the whole work might be completed within the time, and with the desired results, as in the case of other well-considered undertakings; providing, secondly, a year for the collection of materials, arranged in so orderly a manner that the work would by such collection be half done in the first instance, and susceptible of being subsequently verified when its merits of accuracy and completeness should come to be questioned; providing, thirdly, a year for the determination of great questions, brought out by the work of collection; providing, fourthly, a year of execution, in which the actual terms would be considered in their final form; and providing, fifthly, a year of revision and settlement; and, lastly, a year of remuneration and reward, in which the merits of the workmen would be recognised in a suitable manner. Side by side with this leading scheme of operations, it was proposed that an ordinary official staff should be at work, proceeding after its regular and constant fashion in the disposal of ordinary matters, and ensuring, by the discipline of its officers, and their regular action, the fulness, completeness of detail, and the disposal of many minor questions which must arise incidentally, and which, not being questions of high

policy, might be disposed of with less solemnity than those which should be assigned to the adjudication of the Commission in the third year. This scheme was not, we understand, a mere amateur performance, but prepared responsibly for the use of a high legal functionary, and well considered in all its details, as we would consider the design, plan, specifications, estimates and contracts for the execution of a great work, and prepared by one who, for a quarter of a century, or thereabouts, had made this subject the object of close observation and practical experiment.

They were submitted to the first Commission, but did not succeed in obtaining the slightest consideration, and were also submitted to a high legal functionary, who promised to lay them before the present Commission, but it does not appear, by the minutes of the proceedings of the Commission, that this promise was fulfilled.

Nearly unaided by the experience of the first Commission, the second has proceeded in its task without proper assistance, and without that method of proceeding which would have made the want of assistance less injurious to its success. It has been without the commonest official staff, and the secretary, who almost alone has constituted the staff, has, we believe, barely attended the office, except on occasions when the Commission met. No arrangements have been made for the collection of materials in a methodical manner; the working men have worked without concert, or without superior direction, acting uniformly on the whole body of workers, by which such want of concert would have been obviated; and the work executed by the workers has not been systematically examined according to any established test, by which the results of unity, uniformity, propriety, comprehensiveness, and completeness could have been ensured. Thus we have attained almost the third year of the present efforts without having made even a true beginning—at least, not such a beginning as would constitute the germ of final success, and ensure, with skill and industry, the objects contemplated.

Parliamentary papers are accumulating; dissensions are brewing; dignity is offended; pride and pretension are roused; party spirit is excited; all the elements of angry warfare are in

the wind ; but honest, effective work, so much needed by the nation in this case, has not yet begun.

On former occasions we showed that it was unreasonable to expect that great dignitaries of the law, lawyer statesmen, occupied with other matters, and who had reached the verge of life, and could no longer be expected to bestow the labour of drudgery on such matters, should worthily or successfully perform this task without other aid.

And every lawyer and man of affairs with whom we have conversed on this matter has agreed, without shade of difference, to this view.

The Parliamentary papers that have appeared during the last session have unveiled the working of the Commission, have shown its want of direction by a man, master either of the principles or of the details, and have shown how the great men of the Commission, instead of being made the Court of Supreme Direction, have good-naturedly suffered themselves to be assigned to the work of drudgery, which they, by no human possibility, could perform.

We urge, with all the earnestness that men may properly urge in such cases, that the Commission should begin anew—that it should inquire before discussion, discuss before deliberation, deliberate before decision, and decide before giving expression to its decision—that seeing that it cannot constantly sit on these matters, it should assign those duties to some competent member or assistant of their body, whose labours should be so conducted that they may be cognisant not only of the results, but of the processes by which those results are attained.

Let the standing paid Commissioner sit from day to day—report his proceedings as other committees do,—and recommend for the adoption of the Commission some well-defined, connected plan of action, to which the workers may work, as artizans do, and which will lead to a certain result.

If they find a man master of any division of this great field of enterprise, let them with confidence entrust his task to him, taking care not to cripple his efforts by denying him suitable facilities, or by subjecting him to hindrances calculated to discourage the most enterprising and enthusiastic.

Let them deny no assistance which is offered, but frankly respond to such offers as have been made and refused, to the detriment of this cause and the public purse; and let them not wait for applications of the capable to do this work, but seek them out and invite their co-operation and aid.

Some are to be bought by money, presently needed; some by friendly acceptance; some by preferment; some by public acknowledgment. Let these methods be used where they are appropriate, and the rank and file of service will soon be adequately supplied.

Let the jealousies of rivals be curbed by the recognition and appreciation, by the superior officers, of the merits of each, showing that on the great whole to be accomplished there is room enough for all.

Let the whole work be marked out; and proceed with it at once or piecemeal, as time, opportunity, money, or present conviction will allow; but do not permit the suggestion of danger or difficulty to stop either the development of the plan, or attempts to show its feasibility on the part of those who have well considered the matter, or who produce samples of past success. Such are the simple means of success by which this work may be done. It requires no great expenditure, but a due economy of the forces that we have; but carry out what has once been done, realise what so many have suggested, make professional success within the range of public authority, contingent on aid in this work, and there will be forces so abundant, that each division of the work will find its special aid.

Such work cannot be done by a Commission working as this Commission works; nor by men who have not their hearts in it; nor by men who are suffered to starve (as the Assistant-Commissioners are) while they work, and to live in doubt or hopelessness as to their future when they are cast off.

Those who have already tendered service will doubtless be ready to give it, if they can feel assured that they will not for their zeal be poohed-poohed or slighted.

And to that end, we think that the practical chief of the Commission, in its working departments, should be a kind, accessible person, with whom the workers might freely converse;

and that person could be found in the Clerk of the Parliaments; whose position and office and analogous functions mark him out as the very person who ought to fill this place.

Let the principal assistants, too, have their position as *officers*, charged with definite functions, the proper performance of which is ensured by due responsibility and by due remuneration, by honour and recognition as well as by pay; and let them have under them one or more assistants, responsible to them, to aid them in the practical drudgeries, which, without such facilities, operate so powerfully as hindrances to the best workers in this kind of work.

Establish a routine—so complete, that what is casual and extraordinary finds its place as easily as what is regular and constant.

We do not affect to go over all the ground covered by our former articles on this subject, or by those of our contemporaries. Let all suggestions be embodied in a practical chart or code, and be adopted as experience or conviction shall in due time sanction them; and let the principle be to recognise the claims and suggestions of all whose position or opportunities have given them occasion and means of judging of what is requisite.

We have studiously avoided reference to the painful circumstances of personality, which fill so large a space in the parliamentary papers. When men fight, it is useless to dwell upon the conduct of the fighting; the matter of blame is usually found to have its place, as well as its source, in some earlier stage of the business—in a bad beginning—in want of purpose and of plan, of right men, and sufficient money, and the good government of a competent chief rightly directed.

We would recommend the perusal of these papers—not for the purpose of scandal or imputation, but for our instruction and guidance; for the suggestion of better means and better efforts: and with all sincerity we repeat what we stated when we first commenced this series of papers, that no effort on our part will be wanting to conciliate and support those who take part in the great undertaking.

We think that by fairly meeting the exigencies of the case, discarding personalities, and looking straight on to the end and

object, the undertaking may be righted; and it is of such national magnitude, that it should be submitted to the councils of the Cabinet, and to the clear-sighted sagacity and practical energy of our Premier, who would doubtless, in his official capacity of First Lord of the Treasury, cheerfully perform his proper function, in the matter, of *providing* proper funds, upon a proper scale; and the very steps for securing that result—the making of designs, plans, specifications, estimates, and contracts, in order to ground the application to Parliament—would constitute the very best means of enabling everybody, Commissioners and all, to look the matter in the face, and to be prepared for the eventual completion of it, fast or slowly, or rather *festina lentè* fashion; and at the same time bring to the aid of the Commission the public sentiment and the public support, without which no enterprise is permitted to succeed in this country.

ART. VII.—ON PRESUMPTIONS IN CRIMINAL CASES.

IN turning over the pages of Mr. Taylor's recent edition of his valuable and standard work on the Law of Evidence, we observe¹ that he declines to enter into the controversy respecting which so much has at various times been said and written, in regard to the comparative value of direct and circumstantial evidence, on this ground—that the controversy in question “seems to have arisen from a misapprehension of the real nature and object of testimony, and can moreover lead to no practical end.” As speculative discussions, however, are admissible in this periodical, and as the subject here adverted to indubitably possesses much interest, we have been led to put down the arguments *pro* and *con.* which are usually urged in reference to it, and have been further induced to offer some brief observations touching legal presumptions generally, in

¹ Page 72.

the course whereof we have occasionally availed ourselves of Mr. Taylor's admirable volumes, as well as of the original treatise of Professor Greenleaf, upon which they are to some extent founded.

The term "evidence" includes all the means by which any alleged matter of fact is established or disproved. In Courts of Justice we do not look for demonstration: the evidence upon which in the great majority of criminal cases juries act may be false, but nevertheless they *rightly* act upon it, provided there be sufficient probability of its truth—provided there be sufficient to satisfy the mind as to the guilt of the accused (Greenl. p. 3, 4).

In order, however, that this may be so—in order that juries may thus *reasonably* be satisfied as to the truth of a criminal charge brought before them—in order that common sense may not be shocked by the appliance of vague and fluctuating rules, our law proceeds upon fixed principles in its efforts towards eliciting truth: not in the belief that those fixed principles will always, in every individual instance, conduct to it, but with a well-grounded conviction that, in the great majority of cases on which it may be called to adjudicate, they will do so.

Dr. Paley says, in his *Moral Philosophy* (vol. ii. p. 310)—
"That Courts of Justice should not be deterred from the application of their own rules of adjudication by every suspicion of danger, or by the mere *possibility* of confounding the innocent with the guilty." And this proposition seems undeniable, because if those Courts were never to inflict punishment where there was a possibility of the accused being innocent, no punishment would in *any* case be inflicted. Even where the proof of guilt seems to be most complete, the utmost that can be affirmed of it is that it amounts to a very high probability: no truth depending upon human testimony can ever be properly said to be demonstrated. Human witnesses may testify falsely, or may be deceived. Even where there have been a number of concurrent and unconnected circumstances apparently inexplicable upon any hypothesis save that of a prisoner's guilt, it has yet sometimes been made evident that he was innocent.

Aware of the possibility just adverted to, Courts of Justice

strive anxiously to exclude all possibility of the innocent suffering, and adhere to the much-debated maxim, that it is better that "ten guilty persons should escape conviction than that one innocent man should suffer." Without entering on an extended inquiry as to the correctness of this maxim, we may remind our readers that the arguments on either side respecting it have been thus tersely presented by Sir Samuel Romilly: It should be recollected, he says, that the object of penal laws is twofold—the punishment of the guilty and security of the innocent; that the punishment of the guilty is resorted to only as the means of attaining this latter object. When, therefore, the guilty escape, the law has merely failed of its intended effect: it has done no good, indeed, but it has done no harm. When, however, the innocent become the victims of the law, the law is not merely inefficient—it injures the very persons whom it was meant to protect; it creates the very evil it was designed to cure; it destroys the security which it was instituted to preserve (7 Howell, St. Tr. 1581, note). If, then, the popular maxim just alluded to be applied in favour of upholding the strict application of recognised rules of evidence, and not in favour of relaxing them where there is presented sufficient legal evidence of guilt, it may surely be admitted to be sound.

Bearing in mind, then, that demonstration is not to be looked for in Courts of Justice, we may infer that it is competent to a jury to find matters of fact, without direct or positive testimony of them, upon circumstantial evidence only, although the conclusion to be drawn from the circumstances proved be not absolutely certain or necessary. They may do so where the circumstantial evidence is such as affords a fair and reasonable presumption of the facts submitted for decision; and if the evidence has that tendency, it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and to decide whether they are sufficiently satisfactory and convincing to justify them in finding the fact in issue (*Gibson v. Hunter*, 2 H. Bla. 297).

And here, accordingly, it becomes at once necessary to distinguish between *direct* and *circumstantial* evidence. In cri-

main trials, it will generally be found that the main fact to be proved is either directly attested by persons speaking from their own actual and personal knowledge of its existence, or is to be inferred from other facts satisfactorily proved. In the former of these cases, the proof applies immediately to the main fact, without any intervening process, and it is therefore called direct or positive evidence. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy, the evidence adduced is said to be circumstantial. If a witness testifies that he saw A inflict a mortal wound on B, of which he instantly died—this is a case of direct evidence. If a medical witness testifies that, in his opinion, after an examination of the body, a deceased person was shot with a pistol, the wadding of which is discovered, and is found to be part of a letter addressed to the prisoner, the residue of which is found on his person—here the facts themselves are directly attested, but the evidence afforded by them is termed circumstantial, and from these latter facts the jury may presume or infer the prisoner's guilt (Greenl. Ev. pp. 16, 17).

Further: "When one or more things are proved from which experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact, not proved, should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." (Per Best, J., *Burdett's Case*, 4 B. & Ald. 121). So, again, in the same case, Bayley, J. observed: "No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half of the persons convicted of crimes are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there

are sufficient premises to warrant the presumption." (4 B. & Ald. 149).

Circumstantial, then, is, in truth, presumptive evidence; the presumption being, however, of fact not of law; the distinction here noticeable may be thus illustrated. The *presumptio juris* depends upon a rule of law, which says, that from such and such facts a particular and defined presumption shall be drawn. This presumption may or may not be conclusive and indisputable: in the latter case it is a *presumptio juris*; in the former, it is a *presumptio juris et de jure*. A presumption of *fact*, on the other hand, depends upon experience, and is uncontrolled by any positive rule of law. True it is, that a presumption of fact, as that arising from long possession, or from acquiescence and non-claim, may be almost or quite as strong as any disputable presumption of law; but still the distinction between the two is marked: in the one case the jury are free to act according to their convictions; in the other, they are not thus free.

Such being the distinction between a presumption of law and one of fact, it is not surprising that the terms "presumptive" and "circumstantial" evidence are by some writers indifferently applied, and used as convertible. For instance, C. B. Gilbert, in his work on evidence (6th edit., p. 142), thus expresses himself: "When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such facts, and called presumptions, and not proofs, for they stand instead of the proofs of the fact till the contrary be proved." Now, in the passage just cited, the learned writer, although he uses the word "presumptions," is clearly remarking with reference to circumstantial evidence, and indeed these terms are frequently, though not quite correctly, used as synonymous—circumstantial evidence, in truth, coinciding with one class or subdivision only of presumptive evidence, viz., that which includes presumptions of fact. Understanding the term presumption in this limited sense, we may affirm that every presumption is more or less strong, more or less "violent," according as the several circumstances deposed to do more or less usually accompany the fact

which has to be proved. Without laying any stress at all upon the classification of presumptions of fact insisted upon by Lord Coke and the older writers upon evidence—without admitting that any good can result from arranging presumptions under the three heads of violent, probable, and light—we may concede (Co. Litt. 66), that *violenta præsumptio* is many times *plena probatio*; as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. Here, says C. B. Gilbert, commenting upon the above passage, is a “violent” presumption that the person so quitting the house is the murderer; for the blood, the weapon, and the hasty flight are the necessary concomitants of murder, and the next proof to the sight of the fact itself is the proof of those circumstances that do necessarily attend such fact.

Of presumptions, then, it may be admitted that some are stronger, and some weaker, but *quæ non possunt singula multa juvant*; and where the whole of many trifling facts are joined together and combined, the force of them may be irresistible, even independent of any direct or positive testimony (Douglas Case, vol. 1, pp. 33-4). One ordinary instance alone need here be cited as showing the force of cumulative facts: On an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing, or next to nothing; any person might have a counterfeit note in his possession: but suppose, further, proof adduced, that shortly before this particular transaction, he had, in another place, and to another person, offered another counterfeit note, or that, when apprehended, he had a bundle of such notes in his possession, the presumption of guilty knowledge in uttering the note would then be very strong. (Best on Pres. p. 248).

Such is circumstantial evidence, the value of which rests on the connection subsisting between collateral facts, or circumstances satisfactorily proved, and the fact in controversy; the process here being identical with that familiar to us in natural philosophy, where the correctness of a particular hypothesis is often shown by its coincidence with observed phenomena: in

are sufficient premises to warrant & Ald. 149).

Circumstantial, then, is, in truth, presumption being, however, of fact here noticeable may be thus illustrated. The presumption shall depend upon a rule of law, which says, that from such facts a particular and defined presumption shall be conclusive. This presumption may or may not be a *presumptio juris* putable: in the latter case it is a *de jure*. A presumption, former, it is a *presumptio juris et de jure*. True it is, that a fact, on the other hand, depends upon experience, and is trolled by any positive rule of law. Long possession, acquiescence and non-claim, may be almost or quite as any disputable presumption of law; but still the distinction between the two is marked: in the one case the jury act according to their convictions; in the other, they thus free.

Such being the distinction between a presumption of fact, it is not surprising and "circumstantial" evidence applied, and used as convertible in his work on evidence (6th ed.) himself: "When the fact itself comes nearest to the proof of the circumstances that necessarily and called presumptions, and not the proofs of the fact, the passage just the word "presumption" to circumstantial though not quite evidence, in truth, of presumptive evidence of fact. Understand sense, we may affirm strong, more or less stances deposed to

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each of these cases, we alike argue from known data to an unknown conclusion by the same process of induction.

Let us, in the next place, then proceed to inquire for a moment what may be the relative value of direct and circumstantial evidence when estimated by a jurist? Now, on applying ourselves to this part of the subject, we must at once concede, that if witnesses always spoke the truth, direct evidence would be incomparably the best and most convincing attainable: none of a higher kind, indeed, could, on an inquiry as to the commission of crime, as to the happening of past events, possibly be had. The only risk of its misleading would be where, from circumstances, the witnesses—however honest and *bond fide*—might have been mistaken in what they thought they saw take place.

In support of the superior credibility of direct evidence, it may further be urged that conjectures and inferences are not proofs, but, in strictness, rather the consequences of proofs, or of arguments arising from proofs. It being, as just observed, in most crimes difficult to obtain direct proof by the evidence of witnesses actually present at their commission, recourse is had, *ex necessitate rei*, to indirect or circumstantial evidence, the duty of explaining to the jury the weight assignable to each particle of such evidence, when adduced, being imposed upon the judge (Dougl. Case, pp. 41-2); a misconception in whose mind regarding it (not unlikely to happen during the pressure of business at a heavy assize) might seriously affect the verdict. Cases, moreover, frequently present themselves to the practitioner, showing how fallacious may be the inferences drawn from data apparently worthy to be relied on: for instance, the water-mark on paper is often postdated, so that we must not, in a Court of Justice, too hastily infer that an agreement bearing a date prior to that impressed on the paper is necessarily fraudulent.

On the other hand, dicta and authorities are not wanting in support of the superior worth and efficacy of circumstantial, as compared with direct evidence. Indeed, some of the expressions made use of by learned judges in reference to this subject are so strong, and seem so unguarded, that we can scarcely yield assent to them. Thus, in the case of *Annesley v. Earl of*

Anglesea (17 How. St. Tr., p. 1430), it is remarked, that circumstances are, in many cases, of greater force, and more to be depended upon, than the testimony of living witnesses: circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie.

Circumstantial evidence doubtless usually consists of, and brings under the notice of the jury, a wider and more extensive assemblage of facts than direct evidence. Hence it may more easily be disproved if untrue. This remark holds as well with reference to the case for the prisoner, as to that for the prosecution. In general, it will be easier for an accused to disprove—or on cross-examination to throw doubt upon—one or more of many minute circumstances, which in the aggregate might seem to establish the charge against him, than to disprove one of a very small assemblage of facts. If, therefore, he fails in bringing forward such evidence, the presumption will be proportionably strong against him. On the other hand, let us suppose that a prisoner endeavours to establish an *alibi*, by the production of a mass of false evidence; the greater the number of mendacious witnesses who depose to their having seen the accused at the time in question, and at a place other than that in which, on the part of the prosecution, he was shown to have been, the greater the number of false depositions, each of which is exposed to be disproved. And the same remark would seem applicable where false evidence to character is adduced. It is, indeed, scarcely within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, or to establish the fact of innocence, without affording opportunities of contradicting a great part, if not all, of those circumstances.

Further: if a prisoner, in attempting to contradict the evidence adduced against him in some particular, or to explain it in a manner consistent with his innocence, is convicted of falsehood, the weight of the proofs against him will be seriously augmented, and will very possibly, from having been great, become altogether overwhelming. If, for instance, one in whose possession stolen property is found shortly after its abstraction from the custody of the rightful owner give a reasonable

account as to how he came by it, and refer to some known person as the person from whom he received it, this evidence, if substantiated, may entirely exonerate the accused, and put an end to the charge against him. If, on the other hand, the person thus referred to, on being called as a witness, refutes the statement put forward by the prisoner, the case against him will be materially strengthened, and his conviction probably insured (See per *Id.* Denman, C.J., *Reg. v. Smith*, 2 Car. & K. 207).

In regard, then, to the relative value of direct and circumstantial evidence, we may perhaps conclude, that when circumstances connect themselves closely with each other—when they form a large and a strong body of evidence, so as to carry reasonable conviction to the mind, this proof *may* be more satisfactory than that which is direct. Where the proof arises from a number of circumstances which do not seem to have been brought together to bear upon one point, such evidence is less fallible than under some circumstances direct evidence might be, because direct evidence may be false, or may be mistaken (See *Wills on Circumst. Evid.* p. 30).

Upon this branch of our subject we will merely add the following observations by the Indian Law Commissioners (p. 97, *note g*), which are cited in the fifth Report of our own Commissioners on the Criminal Law (p. 26) :—

“In countries,” they remark, “in which the standard of morality is high, direct evidence is generally considered as the best evidence. In England, assuredly, it is so considered ; and its value, as compared with the value of circumstantial evidence, is, perhaps, overrated by the great majority of the population. But in India we have reason to believe that the case is different. A judge, after he has heard a transaction related in the same manner by several persons, who declare themselves to be eye-witnesses of it, and of whom he knows no harm, often feels a considerable doubt whether the whole, from beginning to end, be not a fiction, and is glad to meet with some circumstance, however slight, which supports the story, and which is not likely to have been devised for the purpose of supporting the story. Hence, in England, a person who wishes to impose on a Court of Justice knows that he is likely to succeed best by perjury. But in India, where a judge is generally on his guard against direct false evidence, a more artful mode of imposition is frequently employed. A lie is often conveyed to a Court, not by means of witnesses, but by

means of circumstances, precisely because circumstances are less likely to lie than witnesses."

The remarks already made in this paper naturally lead us to the subject of legal presumptions. These presumptions are of two kinds—*conclusive*, and *disputable*, or such as may be controverted. Of conclusive presumptions there are not many which apply, save incidentally in criminal inquiries; there, indeed, arbitrary presumptions should be very sparingly acted upon, because human actions cannot safely be judged by reference to unbending rules—and it would, moreover, be counter to the spirit of our Constitution to require juries to act in accordance with, and pay implicit obedience to, such rules.

Presumptions of law, indeed, have a peculiar force and power: they are inferences drawn by the Common, or by force of the Statute Law, which are obligatory, partially or altogether, as well upon the judge as upon the jury. These presumptions are distinguishable from presumptions of fact, by the application of this test: that where an inference has to be drawn from circumstantial evidence, a discretion as to whether it shall be so drawn or not is vested in the jury; whereas, in the case of a legal presumption, the law peremptorily requires that a certain inference shall be made whenever those facts are established in evidence, which the law assumes as a basis whence such inference should, with a view to the ends of justice, be drawn. If, therefore, in a civil case, a judge direct a jury contrary to a presumption of law, a new trial is grantable, *ex debito justitiæ*. Where, however, an inference is to be drawn from circumstantial evidence, the Court above, in adjudicating upon a motion for a new trial, can but endeavour, by placing themselves, so far as possible, in the situation of the jury, to determine whether the former verdict can—regard being had to the weight of evidence on either side adduced—properly and fairly be sustained. But again: presumptions of law being in reality rules of law, it is competent to—indeed, incumbent on—the Court to draw inferences required by law from facts alleged and admitted in pleading, as well as from facts proved in open Court (Steph. Pl. 5th ed. p. 392).

Of conclusive legal presumptions, having direct application in

criminal cases, the following are amongst the instances ordinarily exhibited by text-writers :—That an infant under the age of seven years is incapable of harbouring a felonious intention—for example, of being actuated by an *animus furandi* ; and that a wife committing a felony in the presence of her husband, must—save where it amounts to treason or homicide—be presumed to be acting under his coercion. With regard to this latter presumption, the precise words of Sir M. Hale deserve attention. He says : “ It hath generally now obtained, that (the wife) cannot be guilty of larceny jointly with her husband, because presumed to be done by his coercion. *But this I take to be only a presumption* till the contrary appear ; for I have always thought, that if upon the evidence it can clearly appear that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband ” (1 Hale, P. C. 516). The authority of this passage would seem, however, to be very questionable ; and on a recent occasion where it was cited, the Court of Criminal Appeal held that a married woman, whose husband delivered to her property which he had stolen, could not be convicted of receiving stolen goods (*Reg. v. Brooks*, 1 Dears. Cr. Cas. 184). The decision in this case may, however, clearly be supported on another ground, viz. : that the husband and wife being one person in law, the wife could not, under the circumstances proved, be said to have received the stolen property from her husband.

If it be asked on what grounds or foundations these conclusive legal presumptions may be supposed to rest ; the answer will be—mainly on grounds of public policy and expediency, and sometimes because experience and abstract reasoning tend to show that truth is more likely to be arrived at by acting uniformly upon fixed principles, than by drawing inferences in each particular case from facts proved. Hence it is, that even a conclusive presumption of law may be notoriously opposed to truth—the presumption, for instance, that “ every one knows the law.” Thus a foreigner, a native of a country in which duelling is tolerated, shortly after landing on these shores engages in such an affair, which terminates fatally for his antagonist, and is

apprehended on a charge of murder: vainly will he plead—however well-founded in fact such a plea might be—his ignorance of our laws. Ignorance of the law cannot in the case of a native be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner (per Coleridge, J., 1 Dears. Cr. Cas. p. 59). Not more true is it that a slave who sets foot on British soil that instant becomes a freeman, than that an alien here arriving is at once presumed to be gifted with a knowledge of our law (Reg. v. Barronet, 1 Dears. Cr. Cas. 51). Can it, however, with any colour of reason be said that in such a case as this any real hardship results from the dogmatic inference of law? It would seem not, for every social community is first called upon to provide for its own security; and this can only be effected by claiming from all equally implicit obedience to its laws, which could not with tolerable certainty be enforced if a plea of *ignorantia juris* were admissible.

In illustrating the nature of conclusive presumptions of law, we have purposely put forward a somewhat strong case: there was, however, no occasion for so doing, it being obvious that our Criminal Law, dependent as it is in a very great measure upon the wording of particular statutes, is very imperfectly known to the great mass of our fellow-countrymen. It is to be lamented, indeed, that means have not long since been devised for bringing home a knowledge of this branch of law—at all events of its leading principles—to all whom it so nearly touches and so vitally concerns. Steps, however, are happily being made to some extent in this direction by the teaching of the elements of law in many of our schools; and the time perchance may come when a plea of ignorance of Criminal Law, at least in its broader outlines and features, will be as false in fact as it now is inadmissible in a Court of Justice.

The second branch of legal presumptions comprises those which are *disputable*, to which the maxim of law applies, *stabit presumptio donec probetur in contrarium*. The presumption will here take effect, and may even decide a criminal case, if uncontradicted; though it seems reasonable that presumption, not being founded on the basis of certainty, should yield to evidence, which is the test of truth. Of this class of presumptions an

example quite in point may be adduced, founded on the recent statute 14 & 15 Vic. c. 99, s. 8, which requires that from certain facts, when established in evidence, certain inferences shall be drawn, in the absence of counter-proofs on the part of the accused. Various statutes, indeed, might be specified, by which the presumptions of guilt are made legally deducible from certain acts; the onus of proving matter of defence—being thus cast on the accused party (Wills on Circumstantial Evid. p. 25).

Of disputable presumptions, perhaps, the most universally applicable in Criminal Courts is that in favour of the innocence of one accused of crime. It is, moreover, a general rule, closely allied to the above, and of very wide applicability, that where a person is required to do an act, the not doing of which would render him guilty of a criminal neglect of duty, it shall be presumed that he has duly performed it, unless the contrary be shown (per Lord Ellenborough, C.J., *Rex v. Haslingfield*, 2 M. & S. 561).

Disputable presumptions of law are of different degrees of strength. That this is so reason would tell us, and a careful examination of them would in many cases suffice to convince us: it is proved, however, by the fact that not unfrequently conflicting presumptions present themselves in Courts of Justice, of which one is allowed to prevail over the other. Cases of the kind just adverted to, when they present themselves, will be found worthy of careful examination. The effect of these conflicting presumptions of law it is, so far as may be practicable, exceedingly interesting to trace out. A suggestion or two upon this subject must, however, here suffice. The law presumes in favour of legitimacy—it presumes in favour of possession, *i.e.* of the title of the actual occupant of land. Possession is in every case held to be legal till the contrary is proved. Again, the rules of law are *actori incumbit probatio*, and *actore non probante reus est absolvendus*. To apply these rules and maxims: let us suppose that the individual whose legitimacy, and consequently whose title, has been impeached, is in possession of the estate descended to him; that he was born subsequent to the lawful marriage of his assumed parents, and had been treated

by them as legitimate: here both the presumptions of law, to which we just now referred, would be in favour of the defendant, and it would obviously require a strong and convincing chain of circumstantial evidence to oust the occupant of his land. *Probat denique is qui non possidet, utpote quo deficiente in probatione possessor vincit ac absolvendus est* (Douglas Case, vol. i. p. 35). Let us next suppose that the party whose legitimacy is impugned seeks to recover possession of his patrimony (which on the assumption of his illegitimacy has passed to some collateral branch): here, although one of the two presumptions of law just stated might be in favour of the claimant, the other would undoubtedly be against him, and he would be driven to rely upon the inherent and prevailing strength of his own title, and upon the cohesion of the links in the chain of evidence which he might bring together and exhibit.

Having now specified, and to some extent illustrated, the various classes of presumptions, let us endeavour, from what has been said respecting them, to deduce some conclusions in regard to their respective weight and value. Now, in the first place, we think it must be admitted that, in cases where direct evidence is not producible, presumptions of fact are more satisfactory to the mind, and more convincing, than presumptions of law; for without going so far as to affirm that circumstances cannot lie, we may reasonably contend that facts, when closely linked and connected together—when shown to be severally probable and consistent with each other—serve as a very safe guide and index to the fact unknown. Further, presumptions of law, save in some few instances, are not intuitively recognised as sound, nor as specially well calculated to lead to the discovery of truth; they cannot unreservedly be accepted without being first well weighed, scrutinized, and subjected to the strictest tests. Conclusivè presumptions are indeed but arbitrary rules of law, the policy of which is open to discussion; though they can hardly be said under any circumstances to work injustice, inasmuch as their existence is known and understood beforehand, and they operate impartially upon all. Disputable presumptions, again, stand on a somewhat different footing: they are oftentimes, however, so much blended and mixed up with

inferences of fact, that it is very difficult, or altogether impossible, to trace out precisely their operation, and to determine what degree of weight—whether too much or too little—they may in any given case have had with a jury. And this remark would seem to apply, *à fortiori*, where conflicting presumptions of law are presented to notice, conjointly with direct and with circumstantial evidence. Nevertheless, upon the whole, we may concede that the disputable presumptions recognised in our law are supportable on solid grounds, and practically tend to produce correct results.

ART. VIII.—THE SUMMARY PROCEDURE ON BILLS
OF EXCHANGE ACT, 1855.

THIS measure having now become law, it is desirable that we should lay before those of our readers on whom the practical working of the new process must principally devolve, an explanatory account of its character and provisions. The Act, as is well known, is the result of the deliberations of the select committee to whom the Bills of Exchange Bill, presented to the House of Lords by Lord Brougham, and the Bills of Exchange and Promissory Notes Bill, prepared and brought in by Mr. Keating and Mr. Mullings, were referred. It purports to be for the prevention of frivolous or fictitious defences to actions on bills and notes; and that, no doubt, was the object its framers had in view; but the Act does more,—it takes away from the defendants in such actions, when commenced within a specified period, and under the Act, the ordinary right which defendants in other actions have of entering an appearance as of course, and putting the plaintiff to proof of his case, and thus gives a preference and advantage to creditors holding such securities over other creditors, and in this respect runs counter to the tendency of modern legislation, which has laboured for the fair and equal distribution of the assets of the insolvent or embarrassed debtor, and which, in many instances,

has in the most careful manner, as in the case of warrants of attorney and cognovits, guarded against the frauds that are liable to be perpetrated, and the oppression and injustice that may ensue, where any one peculiar description of instrument or security gives the creditor who holds it an advantage over others. Moreover, it cannot be considered sound and statesmanlike legislation, suddenly, and without some great and urgent necessity for the change, to attach new and grave incidents to instruments of such common and general use as bills of exchange and promissory notes. But, while we make these observations, we must not withhold from Mr. Keating and his coadjutors the award of merit due to them for having succeeded in substituting the comparatively moderate and reasonable provisions of this statute for the startling measure proposed by Lord Brougham; of which the principal feature was,—that a new functionary, to be called “the Registrar of Protested Bills of Exchange and Promissory Notes,” should be appointed by her Majesty; and that on the mere registry of a protested bill or note, the holder was, without more, immediately to be entitled to an order of the Court of Common Pleas against the parties to the bill or note whose names were signed or endorsed thereon, for payment thereof; that such order was to have the effect of a judgment against the parties; and that after the brief period of six days from the service of the order, execution might issue against all or any one of them. But while the registration of the protested bill or note, and the rapid process of execution following upon it, was thus made the conspicuous and leading feature of Lord Brougham’s Bill, it was, on the other hand, in a subsequent part of it provided, that the defendant might make a special application to the Court, or a judge, before execution levied, to stay execution, and power was proposed to be given to the Court or judge to direct an issue in fact to be tried, or a special case to be stated for the opinion of the Court; which issue or case would, the parties being hostile, have always to be settled by the judge at chambers, a task involving a nice and careful consideration by the judge of all the circumstances brought before him by the affidavits on both sides, and very probably also in most cases the necessity of one

or more adjournments of the summons. In addition to this, provision was made for the case of the verdict being set aside, and a new trial granted, or error brought. So that when it is considered that where the defendant was let in to defend, there must be, first, the investigation to settle the issue or case gone into, a proceeding both tedious, difficult, and expensive, when compared with the simple process of allowing the defendant to put issuable pleas on the record (and pleas at the present day must be issuable or they will not be allowed), and that all this was preliminary merely to the launching of the case for trial, this latter part of the scheme presents a singular contrast to the summary and precipitate character of the registration, order to pay, and execution thereon, with which it commences; the effect of the whole contrivance being, that if the defendant should survive the unparalleled celerity of the first attack, and be let in to defend, there should be a kind of compensating slowness in the subsequent proceedings, and more expense than in an ordinary action. This novelty was recommended to the English commercial world—we speak from the preamble of the Bill itself—as the mode of recovering on dishonoured bills of exchange and notes which prevails in the law of Scotland, and as being found of beneficial operation, and expedient to be introduced into the law of England. The select committee to whom, as before mentioned, both Bills were referred, appear to have been impressed with a feeling, that a change having been proposed and energetically pressed forward, a change of some kind must be conceded; and, after some inquiry, directed principally to the forms and the costs of the proceedings involved in both measures, they very briefly reported, that they had proceeded to consider the two Bills committed to them, and that, as it appeared to them, that each Bill was founded on the principle of preventing fictitious defences on bills and notes, and of giving greater facilities to parties seeking the assistance of a Court of Justice, that they had determined to hear evidence as to the cost of proceedings under the Scotch system, as proposed in the Bills of Exchange Bill, and under the English system adopted in the Bills of Exchange and Promissory Notes Bill; and that they were of opinion that it was unadvisable to intro-

duce a new system of procedure, if the forms of the English law could be made available for the object in view; and that on hearing the evidence it had appeared to them that the summary procedure might be easily introduced into the English law; and that the costs under the Scotch system would not on the whole be less than those which would be incurred under English practice; and that they, therefore, had determined to proceed with the Bills of Exchange and Promissory Notes Bill,¹ and had carefully considered its provisions. And in this way the select committee happily disposed of the Scotch process of summary diligence, and the new registrar to be appointed by her Majesty.

The new Act came into operation from and after the 24th day of October, A.D. 1855, *vide* section 1, and consists of eleven sections, and the Schedules A and B annexed to the Act; the former schedule containing the form of the new writ and indorsements, the latter the form of final judgment on default of appearance to the writ. By section 11, "The Summary Procedure on Bills of Exchange Act, 1855," is made the short title of the Act; and by section 10 it is expressly enacted, that nothing in that Act shall extend to Ireland or Scotland.

¹ We must here give a place to the observations made by Lord Brougham on this decision of the Select Committee. It is reported that Lord Brougham, in moving that the House should go into committee on the Bills of Exchange and Promissory Notes Bill, said, "it was part of a Bill for giving summary process to creditors upon bills of exchange and promissory notes. At present a creditor could only enforce payment after the delay and expense of an action, before the termination of which the debtor might become insolvent, in which case the creditor would only come in with the rest of the creditors; and the object of the measure was to assimilate the law of England in this respect to what he believed was the law of every other country in Europe. A Bill on this subject had been sent down to the other House last session, but was not passed. He thought that Bill was more complete than the present one, but at that late period of the session he would not expose the Bill to the risk of being rejected by those who were adverse to all measures of this kind, when it went back to the other House, by proposing any addition to it in committee. He would, however, at a future stage move some amendments, without any expectation that they would be adopted." And, in answer to an observation of the Lord Chancellor, as to the risk of losing the bill if amendments were proposed, he added that he (Lord Brougham) "had carefully abstained from suggesting that an 'i' should be dotted or a 't' ticked, for he knew that if he had done so, the adversaries of the measure would have seized upon the opportunity of objecting to the Lords' amendments."—*Vide Rep. Times Newspaper.*

The Act leaves untouched all other remedies on bills and notes, and at the same time it applies exclusively to bills and notes. If, therefore, in suing on a bill or note, it is desired not to rest the action on the bill or note alone, but to join other causes of action, either founded on the consideration for which the bill or note was given, or being distinct and separate claims, whether for liquidated demands or unliquidated damages; the proper course in such case will be, not to adopt the proceeding given by this Act, but to issue the writ under the Common Law Procedure Act, 1852: *i. e.*, either the writ under section 25 of that Act, with a special indorsement of the particulars of the debt or liquidated demand, or the ordinary writ of summons applicable to any cause of action, whether for a liquidated demand or unliquidated damages.

By the first section it is enacted, that all actions upon bills of exchange or promissory notes, commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in Schedule A to that Act annexed and indorsed as therein mentioned; and that it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear, and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in Schedule B to that Act annexed (on which judgment no proceeding in error is to lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) to the date of the judgment; and a sum for costs to be fixed by the masters of the superior Courts, or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and that the plaintiff may upon such judgment issue execution forthwith.

The new writ thus given is, it will be observed, for service

within the jurisdiction of the Courts, and no equivalent for personal service will be allowed, but an order for leave to proceed as if personal service had been effected may be obtained on the grounds specified and in the manner provided by the 17th section of the Common Law Procedure Act, 1852, where personal service cannot be effected, and the defendant knows of the writ and evades service. And as the first seventeen sections of the Common Law Procedure Act, 1852, particularly relate to personal actions commenced by writ of summons, where the defendant is residing or supposed to reside within the jurisdiction of the Courts, those sections, except where they are excluded by the express provisions of this present Act on similar points—for instance, the express provisions as to the form of the writ under this Act and the indorsements thereon—are directly applicable to the new writ, it being provided by the 17th section of this present Act that the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under the present Act. So that, looking for provisions in the Common Law Procedure Act, 1852, applicable to the new writ of summons under this Act, we find, for instance, the mode in which a concurrent writ to such writ is to be issued in the 9th section of that Act, the mode in which it is to be renewed in order to save the Statute of Limitations and for other purposes in the 11th section, the mode of service on a corporation aggregate in the 16th section, and, as already mentioned, the mode of obtaining an order as if personal service had been effected in section 17.

Referring, again, to the first section of the present Act, it will be observed that it states that, in case the defendant shall not have obtained leave to appear, and shall not have appeared to the writ, according to the *exigency* thereof final judgment may be at once signed. The exigency of the writ is to be found in the form given by schedule A, and requires the defendant, within twelve days after service of the writ, to obtain leave from one of the judges of the Courts at Westminster to appear, and to appear, otherwise the plaintiff may proceed to judgment and

execution against him. As to the *amount* of the final judgment to be signed on the defendants not obtaining leave to appear, and not appearing to the writ, such judgment may be signed for any sum not exceeding the sum to be indorsed on the writ, together with interest at the rate specified to the date of the judgment, and a sum for costs to be fixed by the masters, with the approbation of the judges, in the manner above specified. With regard to the rate of interest, where interest is expressly reserved by the instrument, that rate of interest may be claimed, though more than the ordinary rate, not only from the date of the bill or note until its maturity, but for the whole intervening period until the date of the judgment; but where interest is not so reserved, it can only be claimed at the ordinary rate from the maturity of the bill or note; and as the copy of the bill or note is required to be set out in the indorsement on the writ, it will appear clearly on such indorsement on what ground the interest is claimed, and a claim for too much will be invalid on the face of it, and would, without more, furnish grounds for setting aside a judgment signed for the amount improperly claimed, on default of appearance to the writ. It was made, as is well known, the subject of some doubt in the profession, and even of conflicting opinions amongst the judges, whether, where interest was claimed on a writ specially indorsed, with the particulars of the plaintiff's demand under section 25 of the Common Law Procedure Act, 1852, on a bill of exchange or promissory note, not reserving interest, and, therefore, carrying interest only in the nature of damages from its maturity, such claim could come within the provisions of that section. A claim for noting and expenses clearly could not, being for unliquidated damages, but it was at length formally decided that such interest was recoverable, as part of a liquidated demand, within the meaning of that section, the law merchant attaching interest as a matter of right to such bill or note from its maturity; and the considered observations of the Court of Exchequer, made with reference to these points, have a very important bearing on the summary proceeding to be taken under this present statute, inasmuch as they show that any attempt to take a judgment under it, for more than can legally be claimed on the bill or

note, will be visited with reprobation by the Courts, and with certain penal consequences to the party making the experiment. In *Rodway v. Lucas*, 10 Exchequer, p. 672, Pollock, C.B., said : "In the case of *Rodway v. Lucas*, which was before us yesterday, and in which we decided that the 25th section of the Common Law Procedure Act, 1852, authorized interest to be claimed by the special indorsement on the writ, we wish that it should be distinctly understood by the profession that in all cases, except bills of exchange and promissory notes (as to which it is the usual practice of the Court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract, shall, nevertheless, claim it by a special indorsement on the writ, in order to gain an improper advantage, and, in default of appearance, sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs." And here we may conveniently notice the 5th section of the present statute, which enacts that the holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under that Act for the recovery of the amount of such bill or note. This section was, we think, most probably suggested by its having been held that such expenses could not properly be made the subject of such special indorsement as last adverted to ; and we do not understand this 7th section as giving any right of action to the holder other than he would have had before the present Act, but only to provide, that in cases where he is really entitled to recover such expenses, he may include them in the new summary process, by claiming them in his indorsement on the writ, and adding them to the amount of principal, interest, and costs, for which he signs judgment on default of appearance. The caution we have before given against improperly signing judgment for more than the plaintiff is really entitled to, applies with full force here, inasmuch as it has been the common practice in actions on bills and

notes to include these expenses in the particulars of demand, in cases where they are not legally recoverable, and to take the chance of getting them passed on a settlement of the action, or on judgment by default.

With regard to the costs forming part of the amount for which final judgment may be signed, if the plaintiff is content with the fixed costs, he can take his judgment at once, but if he claims more than the fixed costs, the costs must be taxed in the ordinary way; and the practical effect in such case will be that final judgment will be deferred by two steps, namely, the notice of taxation to the defendant, and the taxation itself.

The form of the judgment given by schedule B, after stating the issuing of the writ, and the indorsements thereon, adds: "And the said C D (*i.e.* the defendant) *has not appeared*, therefore it is considered that the said A B (*i.e.* the plaintiff) recover against the said C D, &c. &c." And thus although the defendant may have applied for leave to appear and been refused, still the default on which judgment is signed is put simply as non-appearance by defendant. And it is perhaps not too far-fetched an observation to say that this alone presents some indication, in addition to that afforded by other parts of the Act, that the Legislature intended not that there should be a harsh and arbitrary exclusion of the defendant from appearing, but rather that a wide and liberal discretion should be exercised in allowing him to do so. This brings us appropriately to the provisions of the 2nd section, which enacts that a judge of any of the superior Courts shall, upon application within the period of twelve days from service of the writ, give leave to appear to such writ, and to defend the action, on the defendant paying into Court the sum indorsed on the writ or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit. If, then, the sum indorsed on the writ is paid into Court, leave to appear to the action will be given as of course; a peculiar advantage to those who may have the means of doing so, but which, if insisted on

as a condition, would, like the term of giving security for debt and costs, often be a denial of justice to a poor and needy defendant. In the next place, leave may be obtained to appear upon affidavits satisfactory to the judge, either *disclosing* a legal or equitable defence (*i.e.* not merely averring a defence on the merits, but stating in detail the grounds on which it rests), or stating such facts as would make it incumbent on the holder to prove consideration. The result of the cases on this latter head, viz. when it is incumbent on the holder to prove consideration, is thus stated by Mr. Sergeant Byles, in his work upon "Bills of Exchange :"—"The defendant is not permitted to put the plaintiff to proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *prima facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud or force, or that it was lost, or that it was originally infected with illegality." But while the Legislature has thus assigned three specific grounds, on either of which leave to appear is to be given, viz. the payment into Court, or the legal or equitable defence, or the facts making it incumbent on the holder to prove consideration, shown to the satisfaction of the judge; it has not stopped there, but added that such leave may be granted on affidavit of such *other* facts as the judge may deem sufficient to support the application. And when also we turn to the form given by schedule A, we find it contains a sort of commentary on the 2nd section, showing that the fullest and widest discretion was intended to be given by it, inasmuch as in the form of notice to the defendant it is stated, that leave to appear may be obtained on application to the judge's chambers, Sergeant's Inn, London, supported by affidavit, showing that there is a good defence to the action on the merits, or that it is *reasonable* that the defendant should be allowed to appear to the action. The third section follows up this by providing for the case of a defendant by surprise, or fraud, or otherwise, having had judgment signed against him without a proper opportunity of appearing and defending the action, and enacts that after judgment the Court or judge may, under special circumstances, set aside the judgment, and if necessary stay or set aside execu-

tion, and may give leave to appear to the writ and to defend the action if it shall appear to be reasonable to the Court or judge so to do, and on such terms as to the Court or judge may seem just.

Section 4 provides that in any proceedings under that Act it shall be competent to the Court or a judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof. After an appearance has been entered, the proceedings will be the same as in any other action, subject however to any limitation or condition that may have been imposed by the judge on making the order for leave to appear and defend. We have already noticed that by section 7 the two Common Law Procedure Acts, and the rules under them, are incorporated with this Act, and all the rights and privileges which either of them give to a plaintiff or defendant will apply.

By section 6 it is provided, that the holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named *respectively*; and that all subsequent proceedings against such *respective* parties shall be in like manner, so far as may be, as if separate writs of summons had been issued. This is intended to save the expense of several writs of summons, where one or more of the parties to the bill or note are sued on separate grounds of action; for instance, where both the drawer and the acceptor are sued. In such case there may be one writ of summons, though in the case of both defending there will be two appearances; and the subsequent proceedings in all respects as separate as if two writs had been issued. The word *respectively* is not used in the form where the writ is thus in fact addressed to several defendants requiring them to appear, not as liable in any joint capacity, but for separate causes of action, and in fact in distinct actions; but as a copy of the bill or note sued on, and its indorsements, has to be made on the back of the

writ, it will be shown by that in what character the defendant is proceeded against.

By section 8 it is provided, that the provisions of the Act shall apply, as near as may be, to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and the judges of such Courts, being judges of one of the superior Courts of Common Law at Westminster, shall have power to frame all rules and process necessary thereto. And by section 9 it is provided, that it shall be lawful for her Majesty from time to time, by an Order in Council, to direct that all or any part of the provisions of the Act shall apply to all or any Court or Courts of Record in England and Wales; and within one month after such order shall have been made and published in the *London Gazette*, such provisions shall extend and apply in the manner directed by such order; and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under that Act shall and may be exercised with respect to matters in such Court or Courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provision so applied.

We have now gone through the several clauses and provisions of the Act.

J. P.

* * Since the above observations were written, a case has been reported on the meaning of the words "disclosing a defence upon the merits," in the 27th section of the Common Law Procedure Act, 1852, *Warrington v. Leake*, C. L. Rep. vol. iii. p. 1085, where the majority of the Court of Exchequer held that they merely pointed to the common affidavit of merits, but Baron Martin thought differently. The case should be consulted with reference to the remarks made at page 397 of the foregoing article.

Short Notes of Cases.

EQUITY.

AGREEMENT.—SHIP REGISTRY ACTS.—PROCEEDS OF SALE OF SHIP.—FRAUD.

Armstrong v. Armstrong, Weekly Rep. 1854-5, p. 563.

Under the Merchant Shipping Act, 1854, as under the old statutes relating to shipping, no person, except his name is on the register, can acquire any interest in a ship; and such interest can be transferred only in the manner provided by that Act (s. 76—83). But in the present case, there being an agreement that the registered owner was himself to sell one-fourth of the ship, and to divide the proceeds among the plaintiffs, who were the persons entitled, the same was accordingly sold, and the Master of the Rolls held that the plaintiffs were entitled to the money received in respect of the share. "I am at a loss to understand," said Sir John Romilly, "if the argument for the defendants holds good, how in any way the Court could get over the necessary frauds and evils which would result, because it would be to hold that the navigation laws not only preclude any person from having any right in a ship, except his name appears on the register, but also in the produce of the sale of the ship. Take this case, which is one of daily occurrence: A shipowner dies possessed of a large number of ships, and he appoints executors. Is it to be contended that, having left directions that his ships should be sold, and the money divided among legatees in certain proportions, thereupon the executors could say, 'These are our ships; we are entitled to them by law?' which would be the case, because they would appear in the register in their names. 'We sell them, and as no interest can be given in the ships by any act except such as that specified in the statute, so neither can it be given in the proceeds of the ships, and the *cestui que* trusts under the testator's will cannot call us to account.' I apprehend," said his Honour, "that the argument cannot be carried to that extent. An agreement to sell a ship, and apply the proceeds for the benefit of a person not on the register, gives that person no interest in the ship; but when the ship was sold, he then would be entitled to have the proceeds applied in accordance with the agreement." *M'Calmont v. Rankin* (2 De G. M. & G.

403) is a leading case on this point, as to the distinction between an interest in a ship, and an interest in the proceeds arising from its sale. The result of all the cases, both under the old law and under the recent Act, is that no agreement between the owners and other parties as to the proceeds of the sale of a ship can give an interest in the ship itself; but the present case goes to establish the rule, that when the ship is sold, the agreement as to what shall be done with the money produced by the sale holds good, and will be enforced by a Court of Equity. The leaning of Lord St. Leonards' mind in *M'Calmont v. Rankin* appears to have been in favour of the rule laid down by Sir John Romilly in this case. Vice-Chancellor Kindersley, however, in *Coombes v. Mansfield* (3 Drew, p. 201), remarking upon this decision, says:—"In the recent case of *Armstrong v. Armstrong*, before the present Master of the Rolls, reported at present only in the *Weekly Reporter*, but, as it appears to me, accurately reported, the Master of the Rolls conceived that there might be cases in which the Court would give relief; and in that case he did give relief by way of injunction, restraining the sale of certain shares of a ship. It is certainly a very strong case. I believe I may say that it is the first decided case in which it has been distinctly decided that in any case of fraud this Court gives relief against a registered assignment of a ship; and although I agree that it was a decision quite in accordance with justice and equity, I wish it to be understood that I do not express any concurrence in that decision, having regard to the policy of the Ship Registry Acts."

SHIP REGISTRY ACTS.—EQUITABLE MORTGAGEE OF SHIP.—
NOTICE.—REGISTER CONCLUSIVE AS TO FITNESS OF SHIP FOR
REGISTRATION.

Coombes v. Mansfield, 3 Drew, 193.

The equitable doctrine of notice has no force against registration, in the case of a ship, under the Ship Registry Acts. "The cases in this court are numerous," said Vice-Chancellor Kindersley, "and they clearly establish this,—that a mere contract in writing, however precise and regular, for the purchase and sale of a ship, does not entitle the purchasers to any relief, either as against the vendor, or as against any other person, who, coming afterwards with knowledge of the contract, takes an assignment of the ship, and has it registered. That is clearly decided. This Court has refused repeatedly to apply to the Ship Registry Acts those equitable doctrines which it applies to many other statutes; it considers that the policy of the Ship Registry Acts is such as to prevent the application of these doctrines."

This was the case where a person advanced money on a ship of which he took an assignment, which he registered, having had notice before he advanced the money that another person had a previous assignment for valuable consideration, but which was not registered; and yet the Vice-Chancellor held that there was no relief in equity on the ground of fraud, the Ship Registry Acts excluding the doctrine of notice.

In this case, it was also decided that the register is conclusive evidence that the ship was in a fit state to be registered under the Merchant Shipping Act, 1854; although there might be extrinsic evidence (as here) to show that the ship was not completed at the time of the registry, the Vice-Chancellor considered that he had no jurisdiction to declare the certificate void.

INJUNCTION. — TRADE-MARK. — DECEIT.

Farina v. Silverlock, 1 Kay & Johns, 509.

Where the defendant printed labels which were known to be the trade-mark of the plaintiff, and sold such labels to any one who asked for them, enabling other persons thus to commit a fraud on the plaintiff, and it appeared that such fraud was committed, the plaintiff obtained an injunction upon interlocutory motion, although the defendant denied collusion with any one, and the plaintiff did not prove any particular instance in which he had, in fact, been defrauded by the conduct of the defendant.

SURETY.—CONTRIBUTION.

Hitchman v. Stewart, 3 Drew, 271.

In equity there is an implied agreement amongst sureties that each will bear an aliquot part of the entire loss sustained by the other, with compensation, in the nature of interest, for the money paid by one of the sureties.

DEBTOR AND CREDITOR.—COMPOSITION DEED.—NEGLECT IN SIGNING.—LACHES.—TIME.

Watson v. Knight, 19 Beavan, 369.

The debtor conveyed and assigned all his real and personal estate to trustees for the benefit of his creditors, who should execute the deed of assignment on or before the 2nd of June then next; and creditors who should not execute the same

within the period mentioned were to be excluded from all benefit thereunder, notwithstanding any rule in law or equity to the contrary. The plaintiff, who was a creditor, resided within six miles of the place appointed for signing the deed, and on the forenoon of the 2nd of June, her son called at the solicitor's office, where the deed lay, for the purpose of signing it, but was not permitted to do so, as he had not a power of attorney to do so from his mother. The plaintiff made no further claim in respect of her debt until late in October, when the property was being sold, and then she gave notice that she had a claim on the estate for the amount of a judgment, and that the purchasers would take subject thereto. Sir John Romilly was of opinion that she would not have been bound by the non-execution on or before the 2nd of June, if it had occurred by accident, and she had come the next day and offered to execute it; but having allowed more than four months to elapse, and having set up a claim adverse to the deed, he considered that she was precluded. "If she had intended to come in under the deed, she must have released her claim under the judgment, and it was her duty to inform the trustees, without delay, that she intended to claim under the deed, and to release her judgment."

LANDS CLAUSES CONSOLIDATION ACT.—TENANT FOR LIFE.—INCOME.

In *Re Hungerford*, and in *Re The Rugby and Stamford Railway Company*, 1 Kay & Johns, 413.

A tenant for life of certain lands required by a railway company contracted for the sale of the same in fee to the company, under the Lands Clauses Consolidation Act. Part of the contract was that the vendor was to have five per cent. interest on the purchase-money for his own benefit, until a conveyance should be executed. Vice-Chancellor Wood said it was not unusual to pay five per cent. on unpaid purchase-money; and, in the absence of any direct fraud, he could not say that the tenant for life had taken an improper advantage of his position.

DEBT.—SURETY.—JOINT AND SEVERAL LIABILITY.

Other v. Iveson, 3 Drew, 177.

Two persons wanted to borrow money of a bank, but the bank would not lend it without the security of W, a third person, who consented, and joined with the two others in signing a cheque for the amount, and with them received the money.

Vice-Chancellor Kindersley held that this was not a joint and several liability. His Honour considered that if he were to treat W as a principal, even then it would have been a joint debt, and not a joint and several debt. "Suppose the money to have been received by the three, and afterwards the bank brings an action against W alone, or either of the others alone, I cannot conceive," said his Honour, "on what principle such an action could be maintained; if it could, there is an end of all distinction between joint liability and joint and several liability." W, then, being regarded as a surety only, a bill against his executors after his death was dismissed, there being no liability on his estate, at law or in equity.

FINES AND RECOVERIES ACT, 3 & 4 Wm. 4, c. 74.—ACKNOWLEDGMENT BY MARRIED WOMAN.—INROLMENT.

In *Re The London Dock Company's Act*, *Esparte Taverner*, 25 Law T. 241.

The question here was, whether the acknowledgment of a married woman must be taken before inrolment under the Fines and Recoveries Act; and the Master of the Rolls held that the acknowledgment was good and valid, even though taken after inrolment.

TRUSTEES.—PAYMENTS BY, AFTER FILING BILL FOR ADMINISTRATION.

Sillibourne v. Newport, 1 Kay and Johns, 602.

Vice-Chancellor Wood decided, in this case, that trustees who had filed a bill to have the trusts of the will performed and carried into execution under the direction of the Court, had not thereby deprived themselves of the discretionary power of applying any part, not exceeding a moiety of the income of the trust estate, for the benefit of the testator's daughter, as directed by his will; and his Honour held further, that payments made by the trustees to the daughter of a moiety of the income of the trust estate, after filing the bill, were properly made.

RAILWAY COMPANY.—CORRESPONDENCE "WITHOUT PREJUDICE."

Woodward v. The Eastern Counties and London and Blackwall Railway Company, Weekly Rep. 1854-5, p. 330.

In this case there were lengthened negotiations between the defendants' company and the plaintiff, in relation to land of the plaintiff required for the railway. There was subsequently a

voluminous correspondence, which it was agreed was to be "without prejudice." Upon this point Vice-Chancellor Wood, in his judgment, makes the following remarks:—"The correspondence was to be 'without prejudice,' which means, not that the parties are not to be bound by the statements made in the course of that correspondence, but only that the whole is to be considered as an amicable treaty, not to be strictly construed to the injury of any party. When a party has exhibited what he considers reasonable terms on a treaty 'without prejudice,' his course is quite evident, and why he adopts it. It is as if he were to say, 'I send you a proposal and expect your answer, and shall make use of your answer with a view to costs.'"

MORTGAGOR AND MORTGAGEE.—EQUITABLE TENANT FOR LIFE.—REMAINDER-MEN.—LIEN.

Briggs v. The Earl of Oxford, Weekly Rep. 1854-5, p. 588.

An equitable tenant for life having mortgaged his life-estate as a security to creditors, afterwards committed waste by felling timber: the remainder-men were held to be entitled to a lien as against the incumbrancers upon the rents and profits, to make good the waste.

REVOCATION OF WILL.—CONTRACT FOR SALE BY TESTATOR.—SECONDARY EVIDENCE AS TO PARCELS, THE MAP BEING LOST.

Andrews v. Andrews, Weekly Rep. 337.

The plaintiffs were devisees under the will of the testator in the cause, and the contention was between them and the heir-at-law as to a certain estate devised to them. After the date of the will, the testator agreed to sell the estate to A. Lees and W. H. Lees, the parcels being particularly delineated and described in the map or plan annexed to the contract. The purchasers entered into possession, and upon the death of W. H. Lees, A. Lees, his heir-at-law, received the rents and profits until he became bankrupt. Only a small deposit was paid to the testator at the time of the purchase, and by an order of the Court of Review he was declared to have an equitable lien on the premises for the unpaid residue of the purchase-money; and it was ordered that the premises should be sold by auction, and that the testator should be at liberty to bid at the sale. The testator thereupon became the purchaser for a less sum than the original purchase-money. Upon a reference to the Master, the Master found that the testator had entered into

the above-mentioned contract, but that the map or plan was lost. The question for the Court was, whether this contract was a revocation of the will. Vice-Chancellor Stuart held that it was. The plaintiffs contended that there was no contract, for the subject-matter was uncertain, the map or plan being lost, and parol evidence, they urged, was inadmissible, except to identify the particular map. They also argued that the re-purchase by the testator amounted to an abandonment of the contract for sale. In reference to the question of secondary evidence, the Vice-Chancellor remarked: "It would have been strange indeed if, on a contract under which possession had been taken and enjoyed by a purchaser, and under which the vendor's lien had been enforced in a judicial proceeding, and on re-sale and new title acquired by a re-purchase at a different price—that upon a question of the equitable revocation of the will, when all the facts were proved, the loss of the original plan could exclude secondary evidence as to the parcels of land which were the subject-matter of these transactions and contracts."

**SPECIFIC PERFORMANCE.—INJUNCTION.—EQUITABLE DEFENCE
AT COMMON LAW.**

The Duke of Beaufort v. Glyn, Weekly Rep. 1854-5, p. 502.

In this suit, which was for specific performance, a motion for an injunction was resisted, on the ground that under the Common Law Procedure Act the defendant in the action might make an equitable defence; but Vice-Chancellor Stuart granted the injunction, observing that "when the Court entertains jurisdiction in specific performance, it is not the course of the Court to permit an action to proceed."

**SPECIFIC PERFORMANCE.—COMPROMISE.—VOLUNTARY
AGREEMENT.**

Houghton v. Lees, Weekly Rep. 135.

It is a clear doctrine of Courts of Equity that they will not grant specific performance of a voluntary agreement, nor even of a voluntary covenant under seal. But when the agreement is between members of the same family, and is in the nature of a family arrangement, made fairly and with deliberation, the Court will not look to the amount of consideration.

WILL.—CONSTRUCTION.—“COUSINS.”

Stanger v. Nelson, V. C. S.

Where the word “cousins” was employed in a will, without any words in the context to limit its meaning, Vice-Chancellor Stuart held that first cousins once removed and second cousins of the testator were within the terms of the gift.

EXECUTOR.—DEVASTAVIT.—PRIORITY.—NOTICE.—MORTGAGOR AND MORTGAGEE.—PRINCIPAL AND AGENT.

Collinson v. Lister, 19 Jur. 835.

It was decided by Lord Manners, in *Downes v. Powers* (2 Ball & B. 491), that whoever will deal with an executor for the assets of a testator, for a purpose perfectly inconsistent with the due administration of those assets, subjects himself to the consequences of a *devastavit*. Sir John Romilly, Master of the Rolls, in the present case considered that the same rule applied to a person who advanced money to an executor, confessedly for a purpose relating to the testator's estate, which is perfectly inconsistent with the due administration of the trusts, and that he does not thereby acquire any charge on the assets of the testator. “When a person lends money,” said his Honour, “to an executor, in order that he may apply it for the purposes of the testator's assets, this is a personal debt of the executor; but if, in addition to that, the lender claims repayment out of the testator's assets, it can only be in case he can show that the executor himself would have been allowed that sum in taking the accounts of the testator's estate.”

This was a suit for the administration of a testatrix's estate. In March, 1850, the testatrix advanced 1,500*l.* to Fletcher on the security of a steam-vessel. Shortly afterwards she consented, at the request of the mortgagor, to permit the engines to be removed to another ship, on the terms of having a mortgage of that vessel, which the mortgagor covenanted to assign as soon as the repairs were completed. The plaintiffs were her residuary legatees, and the defendant the executor under her will. The defendant was also manager of a bank. The mortgagor paid a sum of money on account of the repairs to the ship-builders prior to the testatrix's death; but afterwards, being unable to pay a further sum which was demanded, he applied to the defendant to pay the same, as the ship-builders refused to proceed with the repairs unless their demand was

discharged. The defendant finally paid 1,620*l.* by cheques drawn on the bank of which he was manager, and signed by himself as executor of the testatrix, who never had an account with the bank in her lifetime. The mortgagor thereupon assigned the ship to the defendant, and covenanted to pay the moneys advanced by him. At the close of 1851, the directors of the bank discovered the entries of the moneys, amounting to 1,620*l.*, debited to the testatrix's executor; and, at their request, the defendant, in consideration of the 1,620*l.*, assigned to the bank the 1,500*l.* and 1,620*l.* due to him, and the ship, with power to sell the ship, which they accordingly sold, but obtained only 1,150*l.* for the same. The plaintiffs claimed that amount from the banking company. Held, that the defendant, the executor, had not priority over the testatrix's mortgage for the moneys so advanced by him; neither could he, as agent for the bank, by advancing his money on account of the bank to the mortgagee, have obtained for his principal such a priority.

The following propositions were laid down by his Honour in the course of his judgment:—

The executor was bound, before he advanced this money, to have seen that the security of the ship was sufficient to cover the additional advance. The ruling would not have been different if the executor had assets sufficient for the advance in his hands, and the present were an ordinary administration suit.

What the defendant knew, *quod* executor, affected the bank, whose agent he was, with notice.

Even regarding the advance as being made *bond fide* by the bank to the executor, for the purpose for which it was applied, it would not be allowed to the bank against the assets of the testatrix.

As an advance to the executor, it might bind the assets of the testatrix, if it had been beneficially applied for the purposes of her estate, and the *cestuis que* trust had the benefit of it; because there the executors would have been so entitled.

If a man, without taking any security, advances money to another who is an executor, and the executor informs the lender that he requires the money for the purposes of the testator's estate, but in fact misapplies the money, that cannot bind the persons interested in the testator's estate, but constitutes simply a general debt from the borrower to the lender.

**AGREEMENT.—SPECIFIC PERFORMANCE.—LESSOR AND LESSEE.
—LESSEE TAKING POSSESSION.**

Simpson v. Sadd, 4 De G. M. & G. 665.

In this suit, which was for the specific performance by the defendant of an agreement to take a lease of certain premises belonging to the plaintiff, the Lord Chancellor observed, "*Prima facie*, a lessee was entitled to call for his lessor's title; and taking possession was in itself an equivocal act, the question in such case being, whether the lessee, by taking possession, intended to waive, and had waived his right to call for a title. Such an intention might be more probable in the case of a lessee, especially a lessee at a rack-rent, than in the case of a purchaser, but the mere fact of taking possession was not in itself sufficient."

SPECIFIC PERFORMANCE.—RENEWED LEASE.—EXECUTORS.

Stephens v. Hotham, 1 Kay & J. 571.

In this case specific performance of a covenant in a lease to take a renewed lease was decreed against the executors of a lessee, they having entered and admitted assets. "I felt considerable difficulty," said Vice-Chancellor Wood in his judgment, "in compelling an executor to enter into personal covenants respecting the testator's estate, to do that which the law would throw an obligation upon him to do if the testator had entered into a similar covenant."

COMMON LAW.

FORMS OF PLEADINGS.

Wilkinson v. Sharland, 10 Exch. 724.

The declaration in this case was as follows:—The plaintiff sues the defendant for freight for the conveyance by the plaintiff for the defendant at his request of goods in ships; and for the demurrage of a ship of the plaintiff kept on demurrage by the defendant; and for money paid by the plaintiff for the defendant at his request: and the plaintiff claims 150*l*. Plea, never indebted; upon which issue was joined. Upon motion in arrest of judgment, it appeared that the form prescribed by the

Common Law Procedure Act, 1852, had not been complied with, and the Court, in refusing the motion, observed: "We cannot help calling the attention of the profession to the carelessness with which the forms given by this statute are followed. Forms are provided for nearly every case which usually occurs in practice; and when the work is almost done to the hands of those who profess to draw pleadings, it is to be regretted that they will not attend to the forms provided for them, but resort to others not authorized by the Act."

COUNTY COURT.—ABANDONMENT OF EXCESS.

In Re Hill, 10 Exch. 726.

The abandonment of the excess of a claim above 50*l.*, in order to give a County Court jurisdiction, must be the act of the plaintiff himself, or of some person authorized by him, and not the act of the judge. Therefore, where a County Court judge, at the hearing of a plaint, of his own accord, and against the consent of the defendant, amended the particulars of demand by reducing the claim to 50*l.*, and gave judgment for the plaintiff for that amount, the Court granted a prohibition.

PRACTICE AT NISI PRIUS.—RIGHT OF PLAINTIFF'S COUNSEL TO SUM UP.

Hodges v. Ancrum, 24 Law J. Exch. 257.

It was in this case held, by the majority of the Court of Exchequer, that where, at the close of the plaintiff's case at Nisi Prius, the judge expresses an opinion that there should be a nonsuit, the plaintiff's counsel is not entitled to sum up the evidence to the jury. "It is in ease of the plaintiff," observed Parke, B., "that this course should be taken, otherwise it would be the duty of the judge to direct a verdict for the defendant. The power of summing up given by the statute comes into operation only where there is something for the consideration of the jury. In this case there was nothing, and therefore the plaintiff's counsel was not at liberty to sum up the case to the jury."

JURISDICTION OF COUNTY COURT.

Lake v. Butler, 24 Law J. Q.B. 273.

The point here decided is of considerable practical importance. Under the 128th section of the original County Courts Act,

9 & 10 Vict. c. 95, concurrent jurisdiction is given to the County with the superior Court, where the plaintiff dwells *more than twenty miles* from the defendant; it is now apparently settled that this distance is to be determined by a straight line drawn upon the horizontal plane from point to point,—not by reference to the nearest practicable mode of access from the one point to the other.

Admiralty Law.

We are indebted to the courtesy of a correspondent at Montreal for the following report of an important case, decided on the 3rd of July last, in the Vice-Admiralty Court of Lower Canada: in connection with it should be read the American case of the *Osprey*, discussed at page 52 of our February Number:—

NAVIGATION.—COLLISION.

The *Inga*.—Eilertsen.

This was a cause of collision promoted by the owners of the barque *Universe*, in which they claimed compensation for damage sustained by that vessel in consequence of being run into on her voyage from Montreal, on the 28th May, 1854, by a vessel called the *Inga*. The facts of the case sufficiently appear from the following opinion of the learned judge:—

The Court (Hon. Henry Black).—The *Inga*, a Norwegian vessel of about 480 tons, had been lying in the harbour of Quebec, opposite the Lower Town market-place, and in the afternoon of the 28th May, 1854, got under weigh for the purpose of proceeding to the ballast-ground, from two to three miles up the river. The tide was ebbing, and the wind a light breeze from the eastward, and she went up under sail. Between three and four in the afternoon she had nearly reached the place at which she intended to come to anchor. She had come up under her fore-sail, fore-top-sail, and main-top-sail; but having decided upon the place at which she was to anchor, her main-top-sail was taken in, and she was proceeding under her fore-sail and fore-top-sail, the wind still light from the east, the tide ebbing, and the vessel having way enough to stem it, and to

move past the land at the rate of from half a knot to a knot an hour. At the same time the steam tow-boat, *Lumber Merchant*, was coming down the river from Montreal to Quebec, having the barque *Universe*, about 313 tons register, in tow astern of her, with about fifty fathoms of tow-rope. They were going six knots through the water, or about nine past the land with the tide. When the vessels came in sight of each other they were about a mile and a half or two miles apart, all three being somewhere about the centre of the channel: the witnesses examined on the part of the *Universe* saying that the *Inga* was a little to the north, or on the port hand of the line on which the *Lumber Merchant* and *Universe* were proceeding; and the witnesses examined on the part of the *Inga* affirming, on the contrary, that the *Inga* was a little to the south of that line, or, in other words, that the *Lumber Merchant* and *Universe* were a little on her starboard bow. Both parties, however, agree that the vessels were nearly in a straight line. As they approached, the helm of the *Inga* was put a starboard, which threw her head round towards the south. The *Lumber Merchant* and the *Universe*, on the contrary, put their helms aport, which threw their heads also to the south, and the consequence was that the *Lumber Merchant* just cleared the *Inga*, leaving her on the port side; but the *Universe* and the *Inga* came into collision, the *Inga's* bow striking the port side of the *Universe* about the main rigging, doing considerable damage to both vessels. At the time of the collision the tow-rope broke near the steamer's tow-post. The vessels were afterwards cleared, and to recover the damage sustained by the *Universe* the present action is brought against the *Inga*.

The only questions to be decided in order to ascertain whether the action is well or ill-founded are, whether the *Inga* in putting her helm a starboard was justified by the rules and customs of navigation, or whether she ought rather to have kept her course or put her helm aport; and whether the *Lumber Merchant* and *Universe* did right in porting their helms.

The great increase of trade in the river St. Lawrence, and in the inland navigation of the province, and more especially in the number of steam-vessels and of vessels towed by steam-vessels, renders it of great importance that some clear and definite rule should prevail as to the course which should be adopted by such vessels when going in opposite directions, and so placed that if each continue her course there would be danger of collision. The recognized rule for sailing-vessels has always been, that if both vessels have the wind fair, each vessel should port her helm so as to pass each other on the port hand: that if both

vessels are close hauled, the one on the starboard tack should keep her course, and the one on the larboard tack should give way. This, as was lately very clearly remarked by the learned and able Judge Sprague of Boston, in a judgment given by him in September last, in the case of the *Osprey*,¹ is in reality the same rule qualified by the other perfectly well understood rule, that neither vessel is bound to port her helm, if by so doing she would either run into direct danger or would cease to be under command; for, if the vessel on the starboard tack close hauled were to port her helm, she would be thrown into the wind and cease to be under command; whereas the vessel on the larboard tack, by porting her helm, goes off from the wind, and is perfectly under command. The old rule was also that if one vessel had the wind large or free, and the other was close-hauled, the one being close-hauled should keep her course, and the other should port her helm and give way. The reason being obviously that the close-hauled vessel would suffer much more inconvenience by giving way, and falling to leeward, than the other, which having the wind free could immediately regain the line on which she had been proceeding. The rule, therefore, was in substance, that vessels meeting as stated should each port her helm, unless one of them by so doing would either run into danger or be put to much greater inconvenience than the other.

When steam-boats came to be generally used, their power of proceeding in any direction, without regard to the wind, placed them always in the same condition as a vessel proceeding with the wind free, and accordingly the custom seems to have been so to regard them. On the 30th October, 1840, the Trinity House of London made a regulation, that "when steam-vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming into collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. A steam-vessel passing another in a narrow channel, must always keep the vessel she is passing on the larboard hand."² And the preamble to this rule recites, that steam-vessels "may be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack," and that "it becomes only necessary to provide a rule for their observance when meeting other steamers or sailing-vessels going large." Notwithstanding this recital, the rule does not in direct terms apply to steamers meeting sailing-vessels, and it was so

¹ 7 Law Reporter, 384.

² See the Rule 1, W. Rob. 488.

held by Dr. Lushington, in the case of the *City of London*,¹ decided on the 24th April, 1845 : but the considerations in the preamble of the rule were adopted by that learned judge as consistent with the common law, with sound reason, and with the established rules of navigation ; and he held, accordingly, that a steamer should be regarded as a vessel proceeding with a fair wind, when meeting sailing-vessels. The rule of the Trinity House of Quebec, made on the same subject, on the 12th April, 1850, was in spirit the same as that of the Trinity House of London ; and on the 31st March, 1854, the Trinity House of Quebec passed a further regulation, meeting the precise case omitted in the English rule, and directing " that sailing-vessels with a fair wind, and steam-vessels when meeting within the port of Quebec, shall port their helm and draw to the starboard, passing each other on the larboard hand." This rule, as before observed, is only the application of the doctrine that steamers shall be considered as vessels having the wind fair. Between the dates of the two Quebec rules, the English Steam Navigation Act (14 & 15 Vict. c. 79) was passed,² and the 27th section provides, that " Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel, and as regards sailing vessels, to the keeping of each vessel under command : and the master of any steam-vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fair-way or mid-channel thereof which lies on the starboard side of each vessel." This rule applies to all vessels without distinction, whether impelled by steam or by sails. Each vessel is to port her helm ; the only exception being when by so doing she would be brought into danger, or, if a sailing-vessel, the command over her will be lost. This, it is evident, is only the old rule and reasoning, thrown into a general form, and made applicable to all cases. The 296th and 297th sections of the British Shipping Act, which was passed on the 10th August, 1854, and came into force on the 1st May last (17 & 18 Vict. c. 104), contains the following enactment on the subject :—

" Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both

¹ 4 Notes of Cases, 40.

² 7th August, 1851.

ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steam-ships and by all sailing-ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing-ships on the starboard tack close-hauled, to the keeping such ships under command.

"Every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship."

The rules here given are in substance precisely the same as before, though given in other language, and more general and perhaps more definite terms. The rule is as before, that each vessel shall port her helm, unless she would incur danger by so doing, or the command over her would be lost. The British and the Canadian rules are therefore the same, and though that portion of them which relates to the meeting of steamers and sailing-vessels does not appear to have been formally enacted in direct words until recently, yet, as we have seen, it has been always recognized, and adopted as reasonable, and as consistent with the long-established rules of navigation. The same rule seems to prevail in the United States, except that as appears in the case of the *Osprey*, and the cases therein referred to, our neighbours incline to give greater extent to that portion of the old British rule which favours the vessel which would be most inconvenienced by porting her helm, and to hold that as a steamer has greater command over her motions than a sailing-vessel with a fair wind, she ought to give way to such sailing-vessel; and that the latter ought to keep her course without porting her helm, leaving the duty of turning aside so as to avoid the collision solely to the steamer. I am not called upon to decide whether the English or the American interpretation of the old rule would be the best to adopt: first, because the Canadian and English rule must prevail in our waters; and secondly, because in the case before me the *Inga* did not keep her course, but starboarded her helm. The English rule has, however, the advantage of being more certain, and more easily remembered; and it does appear to me that there must be less danger of collision, and that the vessels can get out of each other's way in less time if both draw to starboard, by porting

their helms, than if one stands still, and throws the whole burden of the movement upon the other.

I think, then, that in the present case each vessel was bound to put her helm to port, unless there were some peculiar circumstances in the case which made it dangerous so to do, or rendered a deviation from the rule necessary or justifiable. Now it appears that both the *Inga* and the steamer were perfectly under command; each had sufficient way to make her obey her helm immediately. By the evidence of the *Inga's* own people, it would seem that she was, if at all, very little to the starboard side of the steamer and her tow; so little, indeed, that the master of the *Inga* himself admits that it was necessary to starboard the *Inga's* helm, in order to get sufficiently out of the line of the steamer and her tow, to enable them to pass safely on the starboard side. On the other hand, it is denied by the witnesses for the *Universe* that the *Inga* was at all to the southward; and it is certain, from what took place, that if the *Inga* had ported her helm, or even perhaps if she had continued in her course, the collision would have been avoided; for the *Inga's* people say that her helm was starboarded about two minutes before the collision, and in two minutes she must clearly have run more than half the length of the *Universe* to the southward; and if she had been half the length of the *Universe* less to the southward than she was at the time of the collision, it is equally clear that she would not have struck that ship; and if she had ported her helm she would have gone to the northward, and been still further out of danger: and even if the collision would not have been avoided, the *Inga* would not have been in default, and would not have been responsible for the consequences. The case is not one of a sudden *rencontre*, where there is no time for consideration; the vessels were undoubtedly seen by each other at least ten minutes before they met.¹ Neither is it a case where there was any danger to either in obeying the rule: the channel was wide enough, and both could have drawn to the starboard without risk of touching the ground or of encountering any other damage; and both were in charge of pilots, who were bound to know the rules of the Trinity House and of the river. Under these circumstances, I can have no hesitation in giving effect to a definite and easily-observed rule, which appears extremely well adapted to insure safety, and in deciding that the collision arose from the failure of the *Inga* to obey it.

Messrs. Stuart and Vannovous for *Universe*.

Mr. Edward Jones for *Inga*.

¹ See the case of the General Steam Navigation Company v. Mann, tried before Sir Frederick Pollock, Lord Chief Baron of the Exchequer, at the Summer Assizes at Croydon, 1853.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the *LAW MAGAZINE*, will henceforth be noticed—either shortly, or at length—in its pages.]

A History of the French Bar, Ancient and Modern : comprising a Notice of the French Courts, their Officers, Practitioners, &c., and of the System of Legal Education in France. By Robert Jones, Esq., Barrister-at-Law. London: Benning & Co. 1855.

THIS work is well-timed ; to its contents we shall have occasion, in one of our ensuing numbers, to refer at length, when discussing the existing system of legal education in this country, and the recommendations of the commissioners appointed to report thereupon.

The Friendly Societies' Manual, comprising the New Consolidation Act, 18 & 19 Vict. c. 63, &c. By George C. Oke. London: Butterworths. 1855.

It appears (from recent parliamentary proceedings) “ that the number of Friendly Societies at present registered is 20,000, and each society having on an average 143 members, it follows that out of the whole nine millions of the male adult population of the kingdom, nearly three millions were members of these registered societies. In the unregistered societies there were as nearly as possible one million and a half members, making in the whole four millions and a half persons of the male population of the country connected with the societies. The capital embarked in them amounted to 6,000,000*l*. The importance, therefore, of the New Consolidation Act, 18 & 19 Vict. c. 63, which places all these societies on a permanent footing, and not subjecting them to the evils of fluctuating and temporary legislation (which has been the case since the year 1834, 4 & 5 Wm. 4, c. 40), is obvious.”

Such being the importance of the subject of which our author treats, we need only say, that so far as we have been enabled to judge he has well performed his task, placing under each section of the new Act references to decided cases which tend to elucidate or explain it, and introducing his volume with some useful remarks explanatory of the law relating to Friendly Societies as it formerly was and as it now is.

The Laws relating to Burials in England and Wales. By T. Baker, Esq., of the Inner Temple, Barrister (of the Burial Acts Office). London: W. Maxwell. 1855.

THE provisions of the recent Burial Acts are in this little volume consolidated and arranged in such a manner—by the omission of repealed sections, and the insertion of such as are new, or have been in some respect altered, in their proper places—that the whole may be read together as one Act. The consolidation is preceded by a familiar abstract or analysis of the chief enactments, and followed by a chronological arrangement of the statutes, in the order and words in which they were passed,—forms and practical instructions being appended. We think that this volume is calculated to prove of much utility to all parties interested in the recent sanitary movement.

The Lawyer's Companion for 1856. Edited by W. F. Finlason, Esq., Barrister. London: Stevens and Norton.

WE recommend this diary and law calendar to the use of the profession.

Events of the Quarter.

MISCELLANEOUS.

WE much regret to have to announce amongst the events of the preceding quarter the retirement, on account of ill-health, of the Right Hon. M. T. Baines from the office of President of the Poor Law Board, the duties of which he has so ably and satisfactorily performed. Mr. Bouverie has succeeded Mr. Baines as President of the Poor Law Board, and Mr. Lowe has been appointed Vice-President of the Board of Trade in the place of Mr. Bouverie, and has been sworn in a Privy Councillor.

THE under-mentioned gentlemen, appointed by the Home Secretary, have, during the latter part of the long vacation, been engaged in setting out the wards and apportioning the number of vestrymen in accordance with the provisions of an Act passed in the last session of Parliament for the better local management of the metropolis :— Alexander Pulling, Esq., barrister-at-law ; Arthur John Wood, Esq., barrister-at-law ; George Baugh Allen, Esq., and William Durrant Cooper, Esq.

ON the 14th of August was passed an Act for diminishing expense and delay in the Administration of Criminal Justice in certain cases, by which it was enacted that if any person is charged, before the Justices of the Peace assembled at Petty Sessions, with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not in the judgment of the justices exceed 5*s.*, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for the justices, with the consent of the prisoner, to hear and determine the charge in a summary way ; and if the person charged shall confess the charge, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged and commit him to the common gaol or House of Correction, there to be imprisoned with or without hard labour, for any period not exceeding three calendar months ; and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal. The Act provides, however, that if the person charged do not consent to have the case heard and determined by the justices, or if it appear to the justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or from any other circumstance

fit to be made the subject of prosecution by indictment rather than to be disposed of summarily, the justices shall deal with the case as if this Act had not been passed. It is further provided, that if upon the hearing of the charge the justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged without proceeding to a conviction. We mention the statute, whereof the purport has been above briefly set out, amongst the events of the past quarter, inasmuch as whilst highly approving of the principle on which it is founded, we also regard it as ranking amongst the most important of enactments which have recently been sanctioned by the Legislature.

APPOINTMENTS, &c.

SIR W. H. MAULE, Knight, late a judge of the Court of Common Pleas, has been, by her Majesty's command, sworn of her Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.

FRANCIS JAMES COLERIDGE, Esq., solicitor, of Ottery St. Mary, has been appointed Clerk of Assize on the Midland Circuit.

A. J. STEPHENS, Esq., has been appointed Recorder of Andover, in the room of Mr. Bellenden Ker, resigned.

THE QUEEN has been pleased to appoint Philip Francis Little, Esq., to be Attorney-General, and George Henry Emerson, Esq., to be Solicitor-General, for the Island of Newfoundland; William Johnston Ritchie, Esq., to be one of the Puisne Judges of the Supreme Court of New Brunswick, and Paul Ivy Sterling, Esq., to be a Puisne Judge of the Supreme Court of Ceylon.

WILLIAM RITCHIE, Esq., of the Calcutta Bar, has been appointed to be Acting Advocate-General of India during the absence of Mr. Prinsep.

MR. CHISHOLM ANSTAY, one of the Assistant Commissioners of the late Statute Law Commission, and lately one of the draughtsmen of the present Statute Law Commission, has been appointed Attorney-General for Hong Kong. It is much to be regretted that that gentleman, having so great acquaintance with the Statute Law, and a power of laborious exertion equalled by few, should have been permitted to quit his duties under the Statute Law Commission for those of his present office in a distant colony.

The great difficulty of the work of the Statute Law Commission consists in the want of trained and experienced persons, acquainted with law, in its uses to the public and the practitioner, and in regard to the exigencies of Parliament and the tribunals. A mere jurist, a mere lawyer, a mere official, a mere judge, a mere practitioner, a mere

draughtsman, a mere member of Parliament, is incompetent to the task. Every one of these varied capacities requires to be had in regard, and the consequence is, that either there must be a combined force of such men, or there must be men specially trained for the task. As a lawyer, as a member of Parliament, and as a worker at this work, Mr. Anstey had acquired an unusual amount of experience, which, with his extraordinary energy, promised to be of infinite service, by way of contribution to the general labours of the Commission. Other gentlemen—Mr. Lonsdale, the secretary to the late Criminal Law Commission, and Mr. Rogers, one of the Assistant Commissioners of the late Statute Commission—have also been suffered to quit this service; the former to attend to his duty as County Court Judge, and the latter to go to the colony of Van Diemen's Land as Solicitor-General.

It would be difficult to replace either of these gentlemen, especially as the organization of the Commission does not supply means of an apprenticeship to the requirements of the undertaking.

If Mr. Anstey, Mr. Rogers, and Mr. Lonsdale had each presided over a small corps of workers, their experience would have descended in some degree upon their assistants, and the removal of the principal officer might have been supplied, with difficulty perhaps, but at all events without total loss of the advantages which they have taken away.

It is manifest that the arrangements should be of such sort that they should not be greatly dependent on the qualities of a single person, or upon his being removed by death or preferment.

What is true of the actual workers is true of the chief personages of the Commission. A new chancellor might have a new task to learn; and it is not to be expected that some of the distinguished judges who have generously given their assistance will always be able to bestow much exertion on a work of this nature. Continuity of succession and of exertion is a matter deserving of attention; and this cannot be secured without some degree of organization.

Doubtless it is an excellent means of promoting the energy of the working men to give them preferment; but care should be taken to do justice to the cause as well as to the individual, by arrangements that would mitigate the loss occasioned by his withdrawal.

NECROLOGY.

July.

- 17th. LEWIS, John, Esq., solicitor, London, aged 45.
- 18th. HARVEY, Joseph, Esq., solicitor, Gloucester, aged 45.
- 25th. SELWYN, William, Esq., Q.C., aged 80; the distinguished author of the well-known Treatise on *Nisi Prius* Law.
- 29th. FAITHFULL, George Lockton, Esq., solicitor, Tring, aged 41.
- 30th. DAVIES, Robert, Esq., town clerk of Wells, aged 56.

August.

- 14th. **HOLLIER**, John, Esq., solicitor, aged 71.
20th. **NORTON**, William James, Esq., solicitor, London.
28th. **MORTON**, Thomas Charles, Esq., barrister-at-law, late of Calcutta.

September.

- 8th. **LAWLESS**, William, Esq., solicitor, aged 53.
— **ATHILL**, Richard Bickerton, Esq., barrister, Boulogne, aged 52.
9th. **BREEZE**, Robert, Esq., solicitor, Wandsworth, aged 44.
— **COUPLAND**, Charles, Esq., solicitor, Leek, Staffordshire, aged 66.
16th. **VOULES**, William James, Esq., barrister, formerly an Assistant Poor Law Commissioner.
19th. **ORMSBY**, James John, Esq., barrister.
21st. **BRASSEY**, John, Esq., solicitor, London, aged 24.

October.

- 4th. **BALL**, Henry, Esq., barrister, London, aged 62.

We have also to announce the death of **JOHN HARDY**, Esq., a Bencher of the Inner Temple.

List of New Publications.

Archbold—The whole Law of Indictable Offences; with a Tabular arrangement of Offences, and their Punishment (being a Fourth Volume of the Justice of the Peace and Parish Officer). By J. F. Archbold, Esq., Barrister. 12mo. 17s. cloth.

Archbold—The Limited Liability Act, 18 & 19 Vict. c. 133; with an Introduction, Notes, and an Index. By J. F. Archbold, Esq., Barrister. 12mo. 5s. cloth.

Baker—The Laws relating to Burials in England and Wales; with Notes, Forms, and Practical Directions. By T. Baker, Esq., Barrister. 12mo. 5s. cloth.

Bankruptcy—A New Scale of Costs in Bankruptcy, 1855. By J. Y. Lee. 12mo. 5s. boards.

Beaumont—The Law and Practice of Bills of Sale, and also of the Bills of Sale of Ships, under the recent Statutes, with Precedents, &c. By J. Beaumont, Solicitor. 12mo. 6s. 6d. cloth.

Collier—A Treatise on the Law relating to Mines, including the latest Cases, reported July, 1855, and the New Stannary Act, 1855. By R. P. Collier, Esq., Barrister. 12mo. 8s. cloth.

Cook—The Act for the better Local Management of the Metropolis; with Analysis, copious Explanatory Notes, and full Index. By E. R. Cook, A.M., Barrister. 12mo. 3s. 6d. boards.

Cox—The Law and Practice of Joint Stock Companies, with Limited Liability: comprising the Limited Liability Act, 1855; the Joint Stock Companies' Registration Act, 1844; the Joint Stock Companies' Registration Amendment Act, 1847; with Introduction, Notes, Forms, and general Index. By E. W. Cox, Esq., Barrister. 12mo. 8s. 6d. cloth.

Fawcett—The Criminal Justice Act, 1855, with Short Notes and Index. By J. Fawcett, Esq., Barrister. 12mo. 1s. 6d. sewed.

Hamel—The Laws of the Customs; Supplement for 1855: consisting of an Epitome of the Consolidated Customs Tariff Act, 18 & 19 Vict. c. 97, with the Tables of Duties and Drawbacks; containing also the requisite Instructions and Provisions of the Act of 1855. By F. J. Hamel, Solicitor of Customs. Royal 8vo. 1s. sewed.

Hopwood—Report of the Hopwood Will Case, tried at the South Lancashire Spring Assizes, 1855, before Mr. Justice Cresswell and a Special Jury. 8vo. 5s. sewed.

Jamaica—The Courts of Jamaica and their Jurisdiction. Royal 8vo. 24s. cloth.

James—The Limited Liability Act, 1855, with Introduction and Notes. By J. H. James, Esq., Barrister. 12mo. 1s. 6d. sewed.

Jones—The History of the French Bar. By R. Jones, Esq., Barrister. 8vo. 10s. 6d. cloth.

Levi—The Law of Nature and Nations, as affected by the Divine Law. By L. Levi. 8vo. 3s. 6d. cloth.

Norton—A Letter to the Queen on the Lord Chancellor Cranworth's Marriage and Divorce Bill. By Hon. Mrs. Norton. 8vo. 3s. 6d. sewed.

Oke—The Friendly Societies' Manual : comprising the New Consolidation Act, 18 & 19 Vict. c. 64, and other Statutes affecting Old and New Societies, methodically arranged ; with an Exemplification of the Official System of Bookkeeping, Rules, Tables of Contributions, Cases, Forms, &c. By George C. Oke. 12mo. 6s. boards.

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